Supreme Court of the United States

OCTOBER TERM, 1966

No. 98

CHARLES ROBERT ANDERS, PETITIONER

vs.

CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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[fol. 1]

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF MERCED

No. 4638

[File Endorsement Omitted]

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

vs.

CHARLIE ANDERS, CLIFFORD JONES, DEFENDANT

INFORMATION—filed June 21, 1957

Information for Possession of a Narcotic, a violation of Section 11500 of the Health & Safety Code of the State of California, a felony.

Charlie Anders and Clifford Jones are accused by the District Attorney of Merced County, State of California, by this Information of the crime of Possession of a Narcotic, a violation of Section 11500 of the Health & Safety Code of the State of California, a felony, committed as follows:

The said Charlie Anders and Clifford Jones on or about the 28th day of May 1957, in the County of Merced, State of California, and prior to the filing of this Information, [fol. 2] did wilfully and unlawfully possess a narcotic, to wit: marijuana, without the written prescription of a physician, dentist, chiropodist, or veterinarian licensed to practice in this state.

STEPHEN P. GALVIN District Attorney
of Merced County, State of California

By /s/ BEN CURRY, JR.
Deputy District Attorney

[fol. 6]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MERCED

No. 4638

[Title Omitted]

* * * *

ABSTRACT OF JUDGMENT—filed August 8, 1957

PRESENT:

HON. R. R. SISCHO
[fol. 7] Judge of the Superior Court

Ben Curry,
Deputy Prosecuting Attorney

Donald R. Fretz, Public Defender
Counsel for defendant

THIS CERTIFIES THAT on August 8, 1957, judgment of conviction of the above named defendant was entered as follows:

(1) Case No. 4638 Count No. I

On his plea of "Not Guilty" he was convicted by Jury of a felony Possession of a Narcotic in violation of Section 11500 of the Health & Safety Code of the State of California

Defendant was not armed with a deadly weapon at the time of his commission of the offense or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Section 3024.

(2) Defendant was not adjudged an habitual criminal within the meaning of Subdivision a or b of Section 644 of the Penal Code and the defendant is not an habitual criminal in accordance with the provisions of Subdivision (c) of that section.

(3) IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the said defendant be punished by

imprisonment in the state prison of the State of California for the term provided by law, and that he be remanded to the Sheriff of the County of Merced and by him delivered to the Director of Corrections of the State of California at CALIFORNIA MEDICAL FACILITY AT [fol. 8] VACAVILLE

(4) TO THE SHERIFF of the County of Merced and to the Director of Corrections at California Medical Facility at Vacaville:

Pursuant to the aforesaid judgment this is to command you, the said Sheriff, to deliver the above named defendant into the custody of the Director of Corrections at the California Medical Facility at Vacaville at your earliest convenience.

WITNESS my hand and seal of said Court this 8th day of August, 1957.

E. T. JOHNSON Clerk

By MAGDALENA CHAVEZ, Deputy

[SEAL]

[File Endorsement Omitted]

[fol. 23]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MERCED

Case No. 4638

[File Endorsement Omitted]

* * * *

NOTICE OF APPEAL—filed November 5, 1957

TO: THE HONORABLE JUDGE CISCO, OF THE SUPERIOR COURT IN AND FOR THE CITY, AND COUNTY OF MERCED CALIFORNIA:

Comes now, Charles R. Anders, the named defendant in the above Notice and makes known that he does hereby file Notice of Appeal from the judgment rendered in this Court on the 8th day of August, 1957.

It is further requested that this Court certify and transmit to the District Court of Appeal, the Clerks Transcript, the Reporters Transcript and together with all particulars and subsequent rulings for an adequate and speedy determination of this Cause.

/s/ CHARLIE R. ANDERS

Respectfully Submitted:

CHARLES R. ANDERS
P.O. Box A-42880
Represa, California
In Propria Persona

[fol. 27]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 29]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

3 Crim. 2880

[File Endorsement Omitted]

PEOPLE OF THE STATE OF CALIFORNIA

vs.

CHARLIE ANDERS

ORDER APPOINTING COUNSEL, ETC.—filed June 27, 1958

By the Court:

Appellant having filed an affidavit stating that he is without funds and requesting the appointment of counsel, it is ordered that MR. PATRICK R. MURPHY, Attorney at Law, who has consented to serve be and he is hereby appointed to act as counsel for appellant on this appeal.

Time to file appellant's opening brief is hereby extended until July 27, 1958.

Dated: June 27, 1958

/s/ Van Dyke
VAN DYKE,
Presiding Justice

Mail to:

Mr. Patrick R. Murphy
Attorney at Law
503 Nicolaus Bldg.
Sacramento, Calif.

Attorney General-Sacramento

Robert A. Heinze, Warden
Folsom State Prison

Merced County Clerk

CHARLIE ANDERS:
Box A-42880
Represa, Calif.

Please send your copy of the transcript to Mr. Murphy as soon as possible!

* * * *

[fol. 30]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

PATRICK R. MURPHY
Attorney at Law
503 Nicolaus Building
Sacramento, California
Gilbert 3-6508

August 1, 1958

3 Crim. 2880
FILED
Aug 4 - 1958
Dist. Court of Appeal-Third Dist.
L. A. ENDRES, Clerk
By /s/ Kramer, Deputy

Hon. B. F. Van Dyke, Presiding Justice
Third Appellate District
119 Library & Courts Building
Sacramento 14, California.

Dear Judge Van Dyke:

This is to advise you that I have received and examined the trial transcript of CHARLIE ANDERS as it relates to his conviction of the crime of possession of narcotics.

I will not file a brief on appeal as I am of the Opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him as they relate to his appeal.

Mr. Anders has advised me that he wishes to file a brief in this matter on his own behalf.

Very truly yours,

/s/ Patrick R. Murphy
PATRICK R. MURPHY

PRM/ab
CC/Charlie Anders
Box A-42880
Repressa, California

* * * *

[fol. 31]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

August 4, 1958

CHARLIE ANDERS
BOX A-42880
Represa, Calif.

Re: PEOPLE vs. CHARLIE ANDERS
3 Crim. 2880

We have been advised by your court appointed attorney that after examination of the record he can find no merit to your appeal.

This court will not appoint a new attorney to represent you. If you wish, you may file a brief yourself. If we do not hear from you within 30 days, the record will be given to the court for review and decision.

Very truly yours,

L. A. ENDRES, Clerk

by: /s/ Kramer
Deputy Clerk

* * * *

[fol. 32]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

In re CHARLES ANDERS on habeas corpus

3 Criminal 3757

[File Endorsement Omitted]

PETITION—filed January 21, 1965

Name Charles Anders
Box No. A-42880-A, *Represa, Calif.*
Date 1/17, 1965

Mr. Wilfried J. Kramer, Clerk
District Court of Appeal
Third Appellate District
Sacramento, California

Dear Sir.

I received your letter, dated Jan. 10, informing me that you do not have an extra copy of my records to let me have. However, all I wanted was a duplicate copy of the ones that you have.

Anyway, under the circumstances, I would like for you to place my case back on appeal, because I were denied counsel to represent me at the time my appeal was affirmed. My case is in 167 Cal. App. 2d. It was affirmed in March of 1959, I believe.

I would like to call your attention to Douglas vs California, Cal. Penal Code §§ 1225, 1237). His case is (No. 34 Term, 1962.), handed down [March 18, 1963.]

From a criminal conviction, we need not now decide whether California was to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeals had [fol. 33] sustained his conviction (see Cal. Const. Art. 6 § 4C; Cal. Rules 28, 29), or whether counsel must be

appointed for an indigent seeking review of an appellate affirmance of his conviction in this court by appeal as of right or by petition for a writ of certiorari which lies within the courts discretion. But it is appropriate to observe that a state can, consistently with the fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an "invidious discrimination." William vs Lee Optical Co., 348 U.S. 483, 489; Griffin vs Illinois, supra. p. 18. Absolute equality is not required; lines can be and are drawn and we often sustain them. See Tigner vs Texas, 310 U.S. 141; Goesaert vs Cleary, 335 U.S. 464. But where merits of the one and only appeal an idigent has as of right are decided without benefit of counsel, we think are unconstitutional line has been drawn between rich and poor.

When an indigent is forced to run this ganlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure. In the federal courts, on the other hand, an indigent must be afforded counsel whenever he challenges a certification that the appeal is not taken in good faith. Johnson vs United States, 352 U.S. 565.

[fol. 34] The federal courts must honor his request for counsel regardless of what they think the merits of the case may be; and, "representation in the role of an advocate is required." Ellis vs United States, 356 U.S. 674, 675. In California, however, once the court has "gone through" the record and denied counsel, the indigent has no recourse but to prosecute his appeal on his own, as best he can, no matter how meritorious his case may turn out to be. The present case, where counsel was denied petitioners on appeal, shows that discrimination is not between "possibly good and obviously bad cases," but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. There is lacking that, that equality demanded by the Fourteenth Amendment where the rich man, who, appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for

himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.
[fol. 35] We vacate the judgment of the District Court of Appeals and remand the case to that Court for further proceedings not inconsistent with this opinion.

It Is So Ordered.

Any consideration that you give me, will be deeply appreciated. Thank you very much. May I hear from you soon.

Respectfully Submitted,

/s/ Charles Anders
A-42880-A
Represa, California

* * * *

[fol. 36]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

3 Criminal 3757

[File Endorsement Omitted]

In re CHARLES ANDERS on habeas corpus

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS—January 21, 1965

By the Court:

The petition for writ of habeas corpus to reinstate applicant's appeal is denied since the procedure prescribed by In re Nash, 61 A.C. 538, was followed in this case and this court has again reviewed the record and has determined the appeal was without merit.

/s/ Pierce
PIERCE, P. J.

cc:

Charles Anders
Thomas C. Lynch, Attorney General

* * * *

[fol. 37]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[File Endorsement Omitted]

Crim. 9122

* * * *

CHARLES ANDERS, PETITIONER

vs.

CALIFORNIA, ET., AL, ROBERT A. HEINZE

S.Ct. Crim. .....
Civil No. .....
Pro. Persona

PETITION FOR WRIT OF HABEAS CORPUS—filed June 25, 1965

To: THE HONORABLE CHIEF JUSTICE TRAYNOR, AND ASSOCIATES JUSTICES OF THE ABOVE ENTITLED COURT

Petitioner is seeking his release, from imprisonment at the California State Prison, in Represa, California. Petitioner is being held illegal and unlawful, by Robert A. Heinze and Director Walter Dunbar of Folsom State Prison.

Petitioner is filling herein a petition for writ of Habeas Corpus, and ask the writ be treated as a traverse in return:

[fol. 38] (STATEMENT OF FACTS)

On or about August the 8th, 19/57, in the city and county of Merced, California. Your petitioner was tried and found guilty, by a jury for the crime of possession of narcotic. And at that time, petitioner was sentence to prison, which petitioner, appeal the decision. And on or about March, 11, petitioner appeal was affirmed. (See people vs Anders, 167 Cal. 2d. Crim. 4638.

Your petitioner, requested a counsel to represent petitioner on appeal. And at that time, counsel was appoint-

ed to represent petitioner from the Appelleate Court, Third District. But after the court appointed counsel, read your petitioner's transcript, he withdrew from petitioner's appeal. And at that time, he submitted a letter to the court, stating that petioner didn't haye any merits. The Appellate Court dismissed him, and informed petitioner's appeal, in Pro-Persona. Petitioner, made three motions to the court thereafter, asking them to appoint petitioner another counsel, but each time petitioner's request, was denied. So petitioner was force to prepare his own brief and send it in, in Pro-Persona.

So on about January 15, 19/65, petitioner wrote the Appellate Court, asking them to reinstate petitioner's appeal, under the rule of Douglas Vs California, and also, under Malloy Vs Hogan.

I am going to quote the letter, that petitioner, received from the Appellate Court, dated: January 21, 1965.

(See Exhibit A.)

In re: 3 Crim. 3757

On habeas Corpus

By the Court:

The petition for writ of habeas corpus to reinstate applicant's appeal is denied, since the procedure prescribed by in re Nash, 61 A.C. 538, was folloed in this case and this court again reviewed the record and has decided that the case has no merits. Dated: January 21, 1965.

[fol. 39] So on about January 31, your petitioner wrote the appellate court again, requested that they reconsider their present ruling place petitioner back on his appeal. And I am going to quote to this Honorable court the reply that I received from the court.

Mr. Charles Anders
Box-A-42880-A
Represa, California

Re: Charles Anders on habeas corpus
3 Crim. 3757

Dear Sir:

On January 21, 1965, the court denied your petition for writ of habeas to reinstate your appeal. This determination is now final as to this court. The court cannot consider the argument contained in your letter of January 31, 1965 as it is a repetition of the petition previously denied.

Very truly yours,

WILFRIED KRAMER, Clerk.

[fol. 40] (Points And Authority)

Douglas vs State of California, 372 U.S. 353. Douglas And Bennie Will Mayes was found guilty for 13 felonies and sent to prison. Both appeled as of right to California District Court, and their conviction was affirmed. 187 Cal. 802, 10 Rptr. Both Meyes and Douglas then petitioned for descretionary review in the California Supreme Court, but their petition were denied without a hearing 187 Cal. App. 2d 813. We granted certiorari. 368 U.S. 815.

Although several questions are presented in the petition for certiorari, we address ourselves to only one of them. The record shows that petitioners requested, the assistance of counsel on appeal, and they were denied, even though, it plainly appeared they were indigents. In denying petitioner's request, the California District Court of appeal stated that it had "gone through the record and had come to the conclusion that" no good whatever could be served by appointment of counsel." 187 Cal. 2d 802, 10 Cal. Rptr. 188, 194. The District Court of Appeal was acting in accordance with a California rule of criminal procedure which provides that state appellate courts, upon the request of an indigent for counsel, may make "an in-

dependent investigation of the record and determine whether it would be of advantage to the defendant or helpful to the appellate court to have counsel should appointed . . . After such investigation, appellate courts should appoint counsel if in their opinion, it would be helpful to the defendant or the court, and should deny the appointment of counsel only if in their judgment such appointment would be of no value to either the defendant or the court." People vs Hyde, 51 Cal. 2d 152, 154.

[fol. 41] *We agree, however, with justice Traynor of the California Supreme court, who said that the "(denial) of counsel on appeal to an indigent would seem to be a discrimination at least as invidious as that condemned in Griffin vs Illinois . . . People vs Brown 55 Cal. 2d 64, 71, 357 P. 2d 1072 (concurring opinion.) In Griffin vs Illinois, 351 U.S. 12, we held that a state may not grant appellate review in such a way to discriminate against some convicted defendants on account of their poverty. There, as in Draper vs Washington Post . . the right to a free transcript on appeal in issue. Here the issue is whether or not an indigent shall be denied the assistance of counsel appeal . . . In either case the evil is the same; Discrimination against the indigent . . . For there can be no equal justice where the kind of an appeal a man enjoys, "depend on the amount of money he has," Griffin vs Illinois, supra, at P. 19.*

In spite of California's forward treatment of indigents, under it present practice type of an appeals hinges upon whether or not he can pay for the assistance of counsel. If he can the appellate court passes on the merits of his case only after having the full benefit of written briefs and oral argument by counsel. If cannot the appellate court is forced to prejudge the merits before it can even determine whether counsel should be provided. At this stage in the proceeding only the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is forced to go without a champion on appeal. Any real chance he may have had of showing that his appeal has hidden merits is deprived him when the court decides on an exparte examination of the record that the assistance of counsel is not required.

We are not here concerned with problem that might arise from the denial of counsel for discretionary or manatory review beyond the stagein the appellate process at which the claims have once been presented by lawyer and passed upon by an appellate court.

[fol. 42] *We are dealing only with the first appeal, granted as a matter of right to rich and poor alike (Cal. Penal Code (1235, 1237), from a criminal conviction. We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of appeals had sustained his conviction (see 28, 29), or whether counsel must be appointed for an conviction in this court by appeal as of right or by petition for a writ of certiorari which lies within the court's discretion. But it is appropriate to observe that a state can, consistently with the Fourteenth Amendment, provide for difference so long as the result does not amount to a denial of due process or an" invidious discrimination. William vs Lee Optical Co., 348 U.S. 483, 489: Griffin vs Illinois, supra, P. 18. Absolute equality is not required: lines can be and are drawn and we often sustain them. (See Tigner Vs Texas, 310 U.S. 141; Goesart vs Cleary, 335 U.S. 464. But where the merits of the one and only appeal an indigent has of right are without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.*

When an indigent is forced to run this ganlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure. In the federal courts, on the other hand, an indigent must be afforded counsel on appeal whenever he challenges a certification that the appeal is not taken in good faith. Johnson vs United States, 352 U.S. 365. The federal court must honor his request for counsel regardless of what they think the merit of the case may be: and representation in the role of an advocate is required." In California, however, once the court has "gone through" the record and denied counsel, the indigent has no recourse but to prosecute his appeal on his own. as best he can, no matter how meritorious his case may be. The present case, where counsel was denied

petitioners on appeal, shows that the discrimination is not between "possibly good and obviously bad cases," but between cases where the rich man can require the court to Listen to argument of counsel, before deciding on the merits, but a poor man Cannot.

[fol. 43] There is lacking that equality demanded by The Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel" examination into the record, research of law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merits, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to meaningless ritual, while the rich man has a meaningful appeal.

It is reverse.

"When society acts to deprive one of its members of his life, liberty or property, it takes most awesome steps, No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measure by which equality of our civilzation may be judged."Coppedge vs United States, 369 U.S. 438, 449. See People vs Collins, 220 C.A. 2d page 565, 566.)

Upon appeal judgment was affirmed on April 3, 1953.

In people vs Collins, 117 Cal: App, 2d 175, the California Supreme Court denied a hearing and defendant (page 566) appealed to the United State Supreme Court which on October 12, 1953, dismissed the appeal, but threated it as a petition for writ of certiorari and denied the same (346 U.S. 803 (74 S. Ct. 33, 98 L. Ed. 334). Defendant application for appointment of an attirney to represent him on appeal had been denied before the hearing on the merits, presented on May 21, 1963, a petition for recall of remittittur and appointment of counsel to represent him on appeal, relying upon Douglas Vs State of California, 372 U.S. 353, decided March 18, 1963. In that case

the United States court itself vacated the judgment of division three of this court for failure to appoint counsel and remanded the cause for futher proceedings not inconsistent with the opinion. Complying with the implied direction of said case and Gideon Vs Wainwright, 372 U.S. [fol. 44] 335 and Vaquez Vs District Court of Appeal, 59 Cal. 585.

In re Martin, 58 Cal. 2d 133. We on May 28, 1963, recalled the remittitur, vacated the judgment, appointed present counsel to represent appellant throughout further stages of cause, and gave him time to present a brief on behalf of appellant. *This was done and the cause is now before us for a second time upon the merits and after over 10 years period.*

Your petitioner, sentence is also void, and illegal because the prosecuting attorney, commenting to the jury (6 or 7 times about your petitioner, not taking the witness stand and denying the charges against him. And the judge also violated petitioner constitutional rights, by instructing the jury about your petitioner not taken the witness stand and deny the charged against petitioner. I am going to quote to this Honorable court, the instruction that judge Cisco, gave to the jury. Quote:

"It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does testify or if, through he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence as indicating that among the inferences that may be reasonably therefrom those unfavorable to the defendant are the more probable. The failure of a defendant to deny or explain evidence against him does not, however, create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

[fol. 45] (See Malloy Vs Hogan, 378 U.S. page 1. The court.",We granted certiorari. 373 U.S. 948. The court." We hold that the Fourteenth Amendment guaranteed the privilege against petitioner the protection of the Fifth Amendment's privilege against self-incrimination, and that under the applicable federal standard, the connecticut Supreme Court Errors erred in holding that the privilege was not invoked . . . (continue on page 4. The extent to which the Fourteenth Amendment prevents invasion of rights numerated on the first Eight Amendments has been considered in numerous cases in this court since the Amendment to incorporate all eight of the Amendments, from the decision in 1897 in Chicago, B. & Q. Co. Vs Chicago, 166 U.S. 226, which held that the Due Process Clause requires the states to pay just compensaction for private property taken for public use. It was on the Authority of that decision that the court said in Twining Vs New Jersey, supra, that"It is possible that some of the personal rights safeguarded by the first eight Amendment (continue on 5, against national action may also be safe-guarded against state action, because a denial of them would be a denial of due process of law."211 U.S., at 99, (continue on page 6) Quote:"Court held that in the eight of decision, it was taken as settled that". . . Fourth Amendment's right of privacy has been declared enforceable against the states through the Due process Clause of the Fourteenth Amendment. Mapp Vs Ohio, 367 U.S. 643, 655. Powell vs Alabama, 287 U.S. 45, only last Term this was re-examined and it was held that provision of counsel in all criminal was" fundamental right, essential to a fair trial,"and thus was made obligatory on the state by the Fourteenth Amendment. Gideon Vs. Wainright, 372 U.S. 335, 344.

We, hold today that the Fifth Amendments exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states.

[fol. 46] Decision of the court's since Twining and Adamson departed from contrary view expressed in those cases.

(continue on page 7.)

The Fifth Amendment to the constitution of the United States, commansing that no person' shall be compelled in any criminal case to be a witness against himself."

The shift reflects recognition that the American system criminal prosecution is accussatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential Mainstay. Roger Vs Richmond, 365 U.S. 534, U.S. (continue on page 8), Governments, states and federal, are thus constitutionally compelled to established guilt by evidence indepently and freely secured and may not by coercion prove a charge against an accused out of his own mouth. Since the Fourteenth Amendment prohibits the states from inducing a person to confess through"sympathy falsely aroused,"Spano vs New York, supra, at 322, or other like inducement far short of"compulsion by torture."Hayness vs Washington, supra, it follows a fortiori that it also forbides the state to resort to imprisonment, as here, to compel him to answer question that might incriminate him. The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees federal infrigement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty, as held in Twining, for such silences. This conclusion is Fortified by our recent decision in Mapp Vs Ohio, 367 U.S. held "that in a prosecution in a state court a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. "388 U.S., at 33, Mapp held that the Fifth Amendment privilege against self-incrimination implemented the Fourth Amendment in such cases, and that the two guarantees of personal, security conjoined in the Fourteenth Amendment to make the exclusionary rule obligatory up on the states. We relied upon the great case of Boyd Vs United States, 116 U.S. 616, which considering the Fourth and Fifth Amendment as running almost [fol. 47] that Breaking into a house and opening boxes and drqwers are circumstances of aggravation; but any forcible and compulsory of man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is without, (continue on page 8), condemnation of (those Amendments . . ."At

630, we said in Mapp; "We find that as to Federal Goverment, the Fourth and Fifth Amendments and, as to the states, the freedom from unscionable invasions of privacy and the freedom conviction upon coerced, confession do enjoy an"intimate relation' in their perpetuation of principles humanity and civil liberty (secured) 533, 544. The philosphy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence the very least that together they in either sphere is no man is to be convicted on unconstitutional evidence, "367 U.S. at 656-657. In thus returning to the Boyd view that the privilege is one of the "principles of a freedom government, "116 U.S., at 632, Mapp necessarily repudiated the Twining concept of the privilege as a mere rule evidence"best defended universal justice but as a law proved experience to be expedient,"best defended universal justice but as a law proved experience to be expedient,"211 U.S. at 113-continue on page 11).

"The privelege afforded not only extends to answer that would in themselves support a conviction . . but wise embrances those which would furnish a link in the chain of evidence needed to prosecute . . . if the witness, upon interposing his claim, were requred to prove the hazzard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee . . . To sustain the privilege, it need only be evident from the implication of the question, in the setting in which it is asked, that a responsive answer to the question or explaination of why it cannot be discloseure could result." 341 U.S. at 486-487.

[fol. 48] (See Eddie Dean Griffin, Petitioner, Vs State of California (April 28, 19/65. No: 202 . . . October Term, 1964. Mr. Justice Douglas delivered the opinion of the Court. On page 1) Petitioner was convicted of murder in the first degree after a jury trial in the California court. He did not testify at trial on the issue of guilt, though he did testify at the separate trial on the issue of penalty. The trial court instructed the issue of guilt, stating that a defendant has a constitutional right not to testify.

"As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain be-

cause of facts within his knowledge, if he does not testify or if, though he does testify, he fails to explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and indicating that among the inference that may be reasonable drawn therefrom those unfavorable to the defendant are the more probable."

It added, however, that no such inference could be drawn as to evidence respecting which he had knowledge. It stated that failure of a defendant to deny or explain the evidence of which he had knowledge does not create a presumption of guilt nor by itself warrant an inference of guilt nor relieve the prosecution of any of its burden of proof.' (continue on page 2.)

If this were a federal trial, reversible error would have been committed. Wilson Vs United States, 149 U.S. 60 so holds. It said, however, that the Wilson decision rested not the Fifth Amendment, but on an Act of Congress, namely, 18 U.S.C. (3481. That indeed is the fact, as the Court in the Wilson case states. And see Adamson Vs California, 332, U.S. 287, 294. But that is the beginning, not the end of our inquiry. *The question remains whether, statute or not, the comment rule, approved by California, violates the Fifth Amendment.*

We think it does. It is in substance a rule of evidence that allows the state the privilege of tending to the jury for its consideration the failure of the accused to testify. no formal offer of proof is made as in other situations; but the prosecutor's comment and the court's acquience [fol. 49] are the equivalent of an offer of evidence and its acceptance.

(Argument)

It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No court court could be respected, or respect itself, to sit and entertain a layman's brief in Pro-Persona, when knowing all the time that he is unqualified to know whether or not an indictment or information is good or bad.

Respecting the State's grant of right to test their detention,"the Fourteenth Amendment weigh the interests of rich and poor criminals in equal scale, and its hand extends as far to each.

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. He needs the hand of counsel to assist him through every step of the proceeding.

"In any event, even if it is clear that the appellate court utilized the proper standard, a hearing is sometimes required if his decision presents a situation in which the"so called facts and their constitutional significance (Are) . . . So blended that they cannot be served in consideration. Under Thomas Vs Teets, (9th Cir.) 205 F.2d 236, 237, and cases cited therein, it is shown that when the state Supreme Court denied petitioner, petition for habeas corpus, without making any findings upon the allegations presented, by constitutional doctrine all allegations are taken as true, and the denial itself constitutes a denial of Due Process under the Federal Constitution. It also shows that state process in the case was inefective"to protect the rights of the prisoner."

[fol. 50] (Prayer)

Wherefore, petitioner acting in good faith with a good, just and meritorious cause for relief, in this Honorable Court of competent jurisdiction prays remedy and redress, of which he truly belives he is entitled and which is accorded by the correctional common-law of writ of Habeas Corpus.

That the herein petitioner has only presented the facts and features of the instant case to this Honorable Court to seek that inalienable right of justice, under the constitution of the United States and of the state of the instant case to this Honorable Court to seek that inalienable right of every citizen, of justice, under the constitution of the United States and of the state of California. And your

petitioner ask this Honorable court to order petitioner discharge from custody forthwith.

Respectfully Submitted,

/s/ Charles Anders
Petitioner In Pro*Per-
CHARLES ANDERS
Box-A-42880-A
Represa, California

June 23rd. 1965

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IN THE SUPREME COURT OF THE STATE
OF CALIFORNIA
IN BANK

Crim. No. 9122

[File Endorsement Omitted]

In re ANDERS
on Habeas Corpus.

ORDER DENYING WRIT OF HABEAS CORPUS—filed
July 14, 1965

Petition for writ of habeas corpus DENIED.

/s/ Traynor
Chief Justice

* * * *

[fol. 53]

[Clerk's Certificate to foregoing
transcript omitted in printing]

[fol. 54]

SUPREME COURT OF THE UNITED STATES

No. 493 Misc., October Term, 1965

CHARLES ROBERT ANDERS, PETITIONER

v.

CALIFORNIA

On petition for writ of Certiorari to the Supreme Court of the State of California.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—April 4, 1966

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1181 and placed on the summary calendar.

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JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 98

CHARLES ROBERT ANDERS,

Petitioner,

vs.

CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF FOR PETITIONER

IRA MICHAEL HEYMAN
Counsel for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 98

CHARLES ROBERT ANDERS,

Petitioner,

vs.

CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR PETITIONER

The Opinion Below

The order of the Supreme Court of California denying petitioner's motion for habeas corpus (P.R. 26)* is unreported.

---

* References to P.R. are to the Printed Record.
References to R. are to the balance of the Record on file with the Court.

Jurisdiction

The order granting motion for leave to proceed *in forma pauperis*, and granting the petition for certiorari, was entered on April 4, 1966 (P.R. 27). The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

Question Presented

May a State appellate court refuse to provide counsel to brief and argue an indigent criminal defendant's first appeal as of right on the basis of a conclusory statement by the appointed attorney on appeal that the case has no merit and that he will file no brief?

Statement of the Case

Petitioner was convicted on August 8, 1957 of the felony of possessing marijuana, a narcotic, and was given an indeterminate sentence of six months to ten years (P.R. 2-3; App. A). He sought to appeal to the District Court of Appeal as an indigent. That court ordered the provision of a free transcript. On petitioner's request the appellate court appointed an attorney to act for him (P.R. 5). The attorney informed the court that he would not file a brief because in his opinion there was no merit to the appeal (P.R. 6). His letter read:

"Dear Judge Van Dyke:

"This is to advise you that I have received and examined the trial transcript of CHARLIE ANDERS as it relates to his conviction of the crime of possession of narcotics.

"I will not file a brief on appeal as I am of the Opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him as they relate to his appeal.

"Mr. Anders has advised me that he wishes to file a brief in this matter on his own behalf.

"Very truly yours,

....."

Petitioner requested the appointment of another attorney (R. Ex. 5). The court refused this request in a letter from the Clerk of the Court to petitioner stating: "We have been advised by your court appointed attorney that after examination of the record he can find no merit to your appeal" (P.R. 7). The letter also advised petitioner that he could file a brief himself or permit the court to review and decide the appeal on the record alone (P.R. 7).

Petitioner prepared his own brief (R. Ex. 8), the State responded (R. Ex. 9), and petitioner replied (R. Ex. 10). Petitioner urged that illegally seized items had been introduced into evidence, that the evidence was insufficient to sustain the conviction, that evidence was introduced to establish an offense not charged in the information, and that the jury was not properly instructed on all the essential elements of the offense (R. Exs. 8, 9, 10). He did *not* urge as error comments of the prosecutor and judge to the jury concerning his failure to testify (R. Ex. 2, pp. 108, 119-120). The District Court of Appeal on January 9, 1959 unanimously affirmed the conviction (R. Ex. 11), *People* v. *Anders,* 167 Cal.App.2d 65, 333 P.2d 854 (1959).

Petitioner thereafter was paroled and rearrested and convicted of another felony on January 22, 1964. This conviction was affirmed on appeal and petition for certiorari is presently pending in this Court (No. 492 Misc. October Term, 1965). Petitioner was given an indeterminate sentence of six months to fifteen years on this conviction to run consecutively with the term imposed on the prior conviction (App. A).

On January 21, 1965, petitioner filed for habeas corpus in the District Court of Appeal to reinstate his appeal on the prior conviction. He urged that he had been improperly denied assistance of counsel on the original appeal (P.R. 8-10). The District Court of Appeal denied the petition the same day with a brief opinion (P.R. 11):

> "The petition for writ of habeas corpus to reinstate applicant's appeal is denied since the procedure prescribed by In re Nash, 61 A.C. 538, was followed in this case and this court has again reviewed the record and has determined the appeal was without merit."

Petitioner then sought habeas corpus on the same grounds in the Supreme Court of California (P.R. 12-25), and his petition was denied (P.R. 26).

Summary of Argument

The Fourteenth Amendment requires a State to appoint counsel to represent an indigent criminal defendant who requests representation on his first appeal as of right. The object of the requirement is to assure to an indigent both a meaningful adversary process as well as substantial

equality with nonindigents on appeal. Neither object is achieved where provision of counsel to brief and argue the appeal is denied because the appellate court without benefit of counsel determines on review of the full trial record that the appeal is without merit or that counsel would not be advantageous to the indigent defendant. Nor are these objects any more achieved where, as here, provision of counsel to brief and argue the appeal is denied because the attorney appointed by the court to represent the indigent states in conclusory terms that the appeal is without merit and that he will not file a brief in its support.

ARGUMENT

I.

The Fourteenth Amendment Requires That Counsel Be Made Available to Represent an Indigent Criminal Defendant on His First Appeal as of Right in Order to Insure That an Indigent Will Have His Conviction Reviewed With the Benefit of Lawyer Prepared Briefs and Arguments on the Merits and That an Indigent Will Not Be Disadvantaged in This Respect as Compared With a Person Able to Retain Counsel.

This Court, in the line of cases commencing with *Griffin* v. *Illinois*, 351 U.S. 12 (1956), has been engaged in defining the requirements under the Fourteenth Amendment of substantial equality of indigents with nonindigents in the administration of criminal appeals by the States. It has determined that filing fees cannot be demanded so as to bar an indigent's appeal, *Burns* v. *Ohio*, 360 U.S. 252 (1959); *Smith* v. *Bennett*, 365 U.S. 708 (1961); that a trial transcript or its equivalent must be provided without charge

so as to enable an effective appeal, *Griffin* v. *Illinois, supra; Eskridge* v. *Washington State Board of Prison Terms and Paroles,* 357 U.S. 214 (1958); *Draper* v. *Washington,* 372 U.S. 487 (1963); *Lane* v. *Brown,* 372 U.S. 477 (1963); and finally, that an appointed attorney must be made available on request to represent an indigent before the appellate court on his first appeal as of right, *Douglas* v. *California,* 372 U.S. 353 (1963).

This Court has imposed essentially the same requirements on the federal courts of appeal through construction of 28 U.S.C. 1915. *Coppedge* v. *United States,* 369 U.S. 438 (1962) and *Hardy* v. *United States,* 375 U.S. 277 (1964) make clear that an indigent on request must be provided with a trial transcript. *Johnson* v. *United States,* 352 U.S. 565 (1957), *Ellis* v. *United States,* 356 U.S. 674 (1958), and *Coppedge* v. *United States, supra,* require appointment of counsel on appeal.

The instant case deals with appointment of counsel. The question is whether an indigent appellant is afforded fair process and substantial equality of treatment under the California procedure deemed by the California Supreme Court to satisfy the requirement of *Douglas* v. *California, supra.* Under this procedure counsel is appointed automatically on request, but when counsel notifies the court that he finds no merit in the appeal and will not appear on behalf of the indigent the appellate court proceeds to make a judgment on the merits without benefit of counsel's argument, analysis and briefs.

Two primary reasons underlie the requirement that counsel must be made available to an indigent criminal on his first appeal as of right.

First, our criminal procedure is founded upon the adversary system. The essence of that system is challenge and its effectiveness "depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process." * The appellate process is a vital part of the adversary system. It depends on the marshalling of facts and authorities and skilled presentation by persons trained in the law. The whole process is a mere form if one of the adversaries in the contest is without such training. He normally will not be able to discover and present both obvious and hidden issues in the record, determine applicable law, and argue for relevant interpretations of or changes in existing law. Moreover, he will rarely have the ability to present arguments articulately and cogently so as to focus the attention of busy appellate judges on the substance of his claims.

This Court in *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963), stressed that the nature of our adversary system of criminal justice requires the provision of counsel at trials.

> "Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an

* Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice 10 (1963).

> orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries."

These same considerations apply to appeals especially because appeals deal mainly with issues of "law" (rather than issues of "fact")—issues peculiarly within the province of trained lawyers. The adversary system requires counsel on both sides. Judge Burger concurring in *Johnson* v. *United States,* 360 F.2d 844, 847 (D.C. Cir. 1966), a case involving the same problem as the instant one and discussed at length below, stated cogently:

> "Counsel whose motion [to withdraw from an appointed assignment] we now deny must remember that under our adversary system an appellate court cannot function efficiently without lawyers to present whatever there is to be said on behalf of an appellant, however meager his claims may be, so that the Court can make an informed appraisal."

The second, and independent, reason for requiring appointment of counsel lies in the principle of substantial equality of treatment of indigents and nonindigents. This reason emerged clearly in *Douglas* v. *California* where this Court declared it to be a violation of the Fourteenth Amendment for California to condition appointment of counsel for an indigent's appeal, upon the appellate court's de-

termination that it would serve a useful purpose to do so. In this circumstance, said the Court:

> "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself." 372 U.S. at 357-358.
>
> "For there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.' *Griffin* v. *Illinois, supra,* at p. 19." 372 U.S. at 355.

Clearly, the Fourteenth Amendment permits differences in treatment between rich and poor. "But where the merits of the *one and only appeal* an indigent has as of right are decided without benefit of counsel, ... an unconstitutional line has been drawn between rich and poor." *Douglas* v. *California, supra,* at 357.

II.

Petitioner Was Denied Fourteenth Amendment Rights When the California Appellate Court Affirmed His Conviction on the Merits Without the Benefit of Briefing and Argument of Counsel After Appointed Counsel Declined to Submit Arguments on the Basis of a Conclusory Notification That the Appeal Had No Merit.

Douglas v. *California* rejected a procedure under which the appellate court, unaided by counsel, studied the trial record of an indigent appellant's conviction to determine whether the case had sufficient merit to warrant appointment of counsel. The Court was rightfully fearful that the California procedure could lead to unjustified affirmances of conviction because no law-trained advocate for the indigent studied the record to uncover "hidden merit," researched the law, or marshalled arguments in written briefs on the indigent's behalf. This Court was unwilling to rely on the state appellate court acting as an investigator without adversary processes in screening meritorious cases from unmeritorious ones to determine when to appoint counsel. Many indigents would fare badly under such a procedure because an appellate court in making such a screening would often determine the merits at that preliminary point. Thus an indigent would rarely have counsel on appeal in those situations in which representation is most important—where the initial weight of the argument is apparently contrary to his contentions and trained help by a committed advocate is necessary to uncover and pursue less obvious or complicated issues.

The Court, in concluding as it did in *Douglas*, applied reasoning developed in the State transcript cases, especially

Eskridge v. *Washington State Board of Prison Terms and Paroles,* 357 U.S. 214 (1958) and *Draper* v. *Washington,* 372 U.S. 487 (1963). In these cases the Court found a State procedure unconstitutional which authorized a free trial transcript only if the trial judge certified that the appellant's contentions were not frivolous. The evil in those cases was that an indigent could not have his conviction reviewed with the benefit of a record unless the court found his case worthy on its unaided screening or unless he had the means to buy his own. The evil in the *Douglas* case was that an indigent could not have his conviction reviewed with the benefit of a lawyer's analysis and argument unless the same conditions were met.

The infirmities in the California procedure rejected in *Douglas* are not cured by the procedure in *In Re Nash,* 61 Cal.2d 491, 39 Cal.Rptr. 205, 393 P.2d 405 (1964), which was applied in this case (P.R. 11) and which the California Supreme Court determined satisfied the *Douglas* requirements. Under the *Nash* procedure the preliminary screening to determine whether an indigent should have his conviction reviewed with the benefit of counsel's briefs and arguments is shifted from the court to the appointed attorney. If he files a conclusory "no merit letter" (App. B), as in this case, the appellate court neither requires a full statement of reasons by the appointed attorney nor appoints another attorney, but proceeds to evaluate the appeal on the record or, in addition, on the indigent's *pro se* briefs, such as they are.*

---

* The California procedure as stated in *In Re Nash,* 61 Cal.2d at 495, 39 Cal.Rptr. at 208, 393 P.2d at 408, is as follows:

> "In Douglas v. California, 372 U.S. 353, the United States Supreme Court held that it was a denial of equal protection

The California procedure creates two striking threats to fair process and substantial equality of treatment. First, once the appointed attorney has filed a "no merit letter" the appellate court proceeds to evaluate the merits of the indigent's appeal without anyone arguing for him and with the State represented by counsel who files a brief urging affirmance. This is an adversary proceeding with only one side represented. In an important respect this procedure is even more unfair than that condemned in *Douglas* v. *California* since under it the court's first examination of the case follows the announced conclusion of defendant's lawyer that the case has no merit. In short, if the trouble in *Douglas* was that the defendant was not represented, the trouble in *Nash* is that he is adversely represented.

Second, the determination of whether or not the indigent will be represented is shifted from a disinterested appellate court to an attorney who often will view the appointment as a nuisance. Many attorneys, of course, will carefully comb the record, engage in thorough research and analysis, and set forth in brief and oral argument every contention which can be made in good faith. Many others, however,

---

of the laws to refuse to appoint counsel to represent an indigent defendant on his appeal from a criminal conviction. (See also Vasquez v. District Court of Appeal, 59 Cal.2d 585, 586-587, 30 Cal.Rptr. 467, 381 P.2d 203.) We believe that the requirement of the Douglas case is met, however, when, as in this case, counsel is appointed to represent the defendant on appeal, thoroughly studies the record, consults with the defendant and trial counsel, and conscientiously concludes that there are no meritorious grounds of appeal. If thereafter the appellate court is satisfied from its own review of the record in the light of any points raised by the defendant personally that counsel's assessment of the record is correct, it need not appoint another counsel to represent the defendant on appeal and may properly decide the appeal without oral argument."

will understandably see themselves as "friend of court" and will weigh, on the one hand, the probability of success on appeal against, on the other, the time burden imposed both on the attorney and the court if full argument is presented. This will lead to the filing of a large number of "no merit letters" and the consequent denial of representation on appeal. The experience in the District Court of Appeal in which this case was tried indicates that in a significant portion of cases in which counsel are appointed "no merit letters" are written and briefs are not filed (App. B).

The California procedure under which counsel is denied upon the decision of appointed attorney is analogous to the procedure found invalid in *Lane* v. *Brown*, 372 U.S. 477 (1963). There, under an Indiana procedure, only the public defender could procure a free transcript of a *coram nobis* hearing for an indigent to enable him to appeal denial of the writ. This Court found a denial of equal protection:

> "The upshot is that a person with sufficient funds can appeal as of right to the Supreme Court of Indiana from the denial of a writ of error *coram nobis*, but an indigent can, at the will of the Public Defender, be entirely cut off from any appeal at all." 372 U.S. at 481.

In the instant case, although petitioner's right to appeal was not cut off entirely, his right to an effective appeal, by counsel, a right guaranteed by the Fourteenth Amendment under *Douglas* v. *California*, *supra* was cut off at the will of the appointed attorney.

The California Supreme Court stated that the *Nash* procedure affords indigents "substantially the same representation by counsel on appeal as is afforded indigent

federal prisoners seeking to appeal in forma pauperis." 61 Cal.2d at 496-497; 39 Cal.Rptr. at 208; 393 P.2d at 408.

After the decision in the *Nash* case, however, the United States Court of Appeals for the District of Columbia faced the equality problems raised by the federal appellate procedure, which *Nash* found analogous to California's, and concluded that a procedure under which appointed counsel could withdraw from a case on the basis of his conclusory statement that the case had no merit was defective.

In *Tate* v. *United States,* 359 F.2d 245 (D.C. Cir. 1966), three Circuit Judges found improper the granting of appointed counsel's motion to withdraw by the District of Columbia Court of Appeals on the basis of a two paragraph conclusory report by counsel indicating that the appellant's contentions were unmeritorious. The Circuit Court stressed that the District of Columbia Court of Appeals was not adequately insuring that indigents were being represented by "diligent, conscientious advocate[s] in an adversary process." 359 F.2d at 253.

Soon thereafter, in *Johnson* v. *United States,* 360 F.2d 844 (D.C. Cir. 1966), three other Circuit Judges denied appointed counsel's motion to withdraw. Apparently the Circuit Court had been confronted with numerous requests for withdrawal by appointed counsel, in most instances the requests were granted, new attorneys were not appointed, and indigent appellants were advised that they could go on *pro se.* 360 F.2d at 845 (concurring opinion). The opinion reiterated the Circuit Court policy urging appointed counsel, especially in direct appeals from criminal convictions, to remain in the case, but recognized that counsel might "feel a case to be so lacking in merit that he desires

to withdraw on that ground." 360 F.2d at 844. In such a situation, however, the attorney must file a confidential memorandum, served only upon the appellant, "analyzing the case legally, citing record references to the transcript . . . and also citing any case or cases upon which counsel relied in arriving at his ultimate conclusion." 360 F.2d at 844-845. The court stated:

> "To fulfill our responsibility under the *Ellis* decision, we must conclude not only that counsel has made a conscientious investigation of the case, but also that we agree with his evaluation of it. We cannot reach a conclusion in the absence of a fully documented memorandum." 360 F.2d at 845.

The right to appointed counsel in the state courts, as in the federal courts, is the right to appointment of an advocate, not to an attorney acting as *amicus curiae*. The language in both *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) and *Douglas* v. *California*, 372 U.S. 353 (1963) assumes that counsel acts as an advocate on behalf of his indigent client. Substantial equality and fair process in the adversary context requires this. The rejection of the California screening process in *Douglas* would have been baseless if consideration by *amicus* was sufficient under the Fourteenth Amendment. Certainly an appellate court adequately could fulfill that role.

The California procedure applied in the instant case suffers from the same infirmities as the District of Columbia procedure in effect prior to the *Tate* and *Johnson* cases. A substantial number of appointed attorneys file "no merit letters" (see App. B), there is no assurance that counsel are acting as advocates, and appeals of indigents

often proceed without benefit of lawyer briefs and arguments.

In the federal system an indigent may be denied leave to proceed *in forma pauperis* if his only issues are "frivolous." *Coppedge* v. *United States,* 369 U.S. 438 (1962). No greater obligation should be placed on the States under the Fourteenth Amendment. But it is difficult to imagine many appeals that present only "frivolous" issues in view of counsel's ability, and duty, to argue for appropriate changes in the law. In this case, for instance, the prosecutor and the trial judge commented on petitioner's failure to testify (R. Ex. 2, pp. 108, 119-120). They thus transgressed due process rights later announced in *Griffin* v. *California,* 380 U.S. 609 (1965). Appellate argument for overruling or distinguishing *Adamson* v. *California,* 332 U.S. 46 (1947) would certainly not have presented a "frivolous" contention.

In any event, the issue of frivolity must be determined by a means which amply protects the indigent appellant from being denied representation where non-frivolous issues are involved. The California procedure does not furnish such protection for, as in this case, it leaves the evaluation to an appointed attorney who may act as *amicus* rather than advocate and who will have many reasons for not briefing or arguing a case where in his estimate the chances of success are slim.

The practice of the District of Columbia Circuit Court of Appeal affords more adequate protection. Counsel must convince the court that the issues are truly "frivolous." This must be done in a documented memorandum which analyzes the facts and applicable law. There is little time

advantage in preparing such a memorandum over filing a brief on the merits and hence the temptation to withdraw where the chances are slim is minimized. At the same time, however, the procedure provides a means for appointed counsel to withdraw in a case where he believes that he can make no argument in good faith.

III.

Petitioner's Claim Is Properly Before This Court.

The State of California in its Response to the Petition for Certiorari did not contend that petitioner lacked standing, that the case was moot, or that the State court's decision rested on an adequate non-federal ground. The absence of such contentions seems proper. Nevertheless, petitioner wishes briefly to indicate that his case is properly before this Court despite the fact that success on remand, should petitioner prevail, will not lead automatically to his release from custody.

Petitioner is presently serving a prison term which may last until August 9, 1982. If he is successful in securing reversal of the conviction here in issue he must be released no later than January 20, 1979.

Petitioner was convicted of possessing marijuana on August 9, 1957. He received an indeterminate sentence of six months to ten years (App. A). Under the California indeterminate sentencing law the Adult Authority fixes the sentence within these limits. Calif. Penal Code, §§ 3023, 5077. When on parole petitioner was arrested for burglary. He was convicted for this offense on January 20, 1964 and received an indeterminate sentence of six months to fifteen years to run consecutively with the prior sentence (App. A).

Under California law the two consecutive sentences became one continuous term, 27 *Opinions of the Attorney General* 210 (Calif. 1956), the aggregate maximum of which is twenty-five years commencing on the date of the first conviction.

Under Calif. Penal Code, § 3024(c) the Adult Authority had to require that petitioner serve a minimum of at least two years from the date of the second conviction, or until January 20, 1966. After that time the Adult Authority is authorized to release or parole petitioner. However, under Calif. Penal Code, § 3021, the Adult Authority may determine or redetermine at any time prior to outright release the length of time petitioner must serve (or be subject to parole conditions) within the aggregate maximums of the consecutively imposed sentences. *In Re Cowen,* 27 Cal.2d 637, 166 P.2d 279 (1946), cert. denied, 329 U.S. 742 (1947). *In Re Costello,* 262 F.2d 214 (9th Cir. 1958); 27 *Opinions of the Attorney General* 210 (Calif. 1956).

Petitioner sought certiorari on both convictions—from denial of collateral relief regarding the first (in the instant proceeding) and from affirmance on direct appeal of the second (the petition still pending this Court's action). If he were successful on both, and reversals followed in the California courts, he would be released from custody immediately. Certiorari, however, has only been granted regarding the first conviction. Success in this proceeding alone will not lead to immediate release. But it may lead to a reduction of the maximum possible term of incarceration and to erasing from the record before the Adult Authority a prior conviction of relevance in the setting of the term within the fifteen year maximum under the second conviction.

Habeas corpus is an appropriate remedy in California to test the legality of a conviction where fundamental unfairness, such as lack of counsel, is charged even though success on the petition will not lead to immediate release. *In Re Jackson,* 61 Cal.2d 500, 503, 39 Cal.Rptr. 220, 393 P.2d 420 (1964); *In Re Newbern,* 53 Cal.2d 786, 3 Cal. Rptr. 364, 350 P.2d 116 (1960); *Neal* v. *State of California,* 55 Cal.2d 11, 9 Cal.Rptr. 607, 388 P.2d 182 (1960); *In Re James,* 38 Cal.2d 302, 240 P.2d 596 (1952). See Witkin, California Criminal Procedure, §§ 808, 828 (1963).

The District Court of Appeal denied petitioner's application for habeas corpus to reinstate his appeal on the merits (P.R. 11). That petition was based on the federal claim that California had denied petitioner a right to counsel on appeal secured by the Fourteenth Amendment (R. Ex. 12). No appeal lies from the denial of habeas corpus in California. *People* v. *Ryan,* 118 Cal.App.2d 144, 257 P.2d 474 (1953). An applicant can proceed only by petition for habeas corpus in the higher court. *Ibid.* This petitioner did, again raising his federal constitutional claim (P.R. 14-23). The California Supreme Court's order does not state the reasons for denial. But in view of the intermediate court's ruling on the merits and the scope of the habeas remedy under California law, it cannot be argued that the order of the California Supreme Court rested on some unstated adequate non-federal ground.

Arguably, the doctrine of *McNally* v. *Hill,* 293 U.S. 131 (1934) prevents a federal court from granting relief under 28 U.S.C. § 2254 if the applicant would not thereby be entitled to immediate release from custody. But see *United States ex rel. Durocher* v. *La Vallee,* 330 F.2d 303 (2d Cir.), *cert. denied,* 377 U.S. 998 (1964); Heyman and Tigar,

Book Review: *A Handbook on Federal Habeas Corpus*, 53 CALIF. L. REV. 914, 918 (1965). Nevertheless, the *McNally* doctrine is not applicable where this Court reviews a state court denial on the merits of a petition for collateral relief based on a federal claim. The question is not the extent of relief available under 28 U.S.C. § 2254, but whether there has been a final judgment of the highest state court in a case and controversy rejecting a federal claim. A case and controversy exist here. Petitioner is prejudiced by the conviction in two substantial ways. There has been a final judgment by the California Supreme Court rejecting petitioner's federal claim.

Conclusion

The refusal to provide counsel to brief and argue petitioner's first appeal as of right on the basis of the conclusory statements of the appointed attorney that the case had no merit denied petitioner rights secured by the Fourteenth Amendment. The case is properly before this Court.

The judgment of the California Supreme Court should be reversed and the case remanded with directions to reinstate petitioner's appeal.

Respectfully submitted,

IRA MICHAEL HEYMAN
Counsel for Petitioner

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APPENDIX A

(Letterhead of Department of Corrections, Sacramento)

July 29, 1966

Mr. Ira Michael Heyman
University of California
School of Law (Boalt Hall)
Berkeley, California 94720

Re: ANDERS, Charlie
CSP No. A-42880

Dear Mr. Heyman:

In response to your letter of July 19, 1966, the above-identified inmate is under sentence on two commitments as follows: He was received August 12, 1957 from Merced County, Case No. 4638 for Possession of Narcotics, in violation of Section 11500 of the Health and Safety Code for an indeterminate sentence of 6 months to 10 years. On January 22, 1964 he was returned from parole as a violator with a new term from San Bernardino County, Case No. CR 16312, for the offense of Burglary 2nd degree with two prior felony convictions for an indeterminate sentence of 6 months to 15 years, to run consecutively with the Merced County term.

Pursuant to Section 3024(b) of the Penal Code, his minimum term is aggravated to 2 years on the second sentence and pursuant to Section 3043 of the Penal Code, he is required to serve 2 years prerequisite to parole. This establishes a minimum eligible parole date of January 22, 1966. Since he has served his minimum, the prior felony conviction will not limit any future Adult Authority action in this case.

Since the two commitments are consecutive with each other, he is serving one continuous term (Ops. Atty. Gen., Vol. 27, Page 210).

We hope this is the information desired.

Very truly yours,

WALTER DUNBAR
Director of Corrections

/s/ PETER J. MURRY
Peter J. Murry
Chief Records Officer

PJM/jr

cc: Mr. Glen Smith, R.O.
CSP, Folsom

APPENDIX B

The following excerpt is quoted from Volume 2, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS —THE STATE REPORTS (Silverstein, Ed. American Bar Foundation 1965), pp. 67-68. The passage appears in the report on California prepared by Professor Norman Abrams of Los Angeles and Bernard Petrie, Esq. of San Francisco.

"The following statement described the current practice regarding appointment of counsel on appeal in the Third District Court of Appeal, which receives cases from both Shasta and Sacramento Counties:

> Before *Douglas* v. *California* the court declined to appoint counsel for indigents only in cases of guilty pleas. Thus, this district did not pursue the practice of screening the record and sometimes declining appointment, as did the Second District. Now, after the *Douglas* case, the Third District appoints counsel in cases of guilty pleas as well. A full transcript is provided free of charge. In a significant portion of the cases in which counsel are appointed, such counsel write a so-called no-merit letter and do not bother to write a brief, enabling a swifter disposition. Even in such cases a research attorney and the judge assigned to write the opinion go over the case and examine the transcript. Counsel are appointed from a panel of young attorneys who volunteer. Sometimes, through inexperience, these attorneys overlook points, but they are backed up by the court's research attorney. Compensation varies from $50 to $300.

As a result of the decision in *Douglas*, the Riverside County Public Defender's Office has recently undertaken, at the request of the Fourth District Court of

Appeal, to handle all indigent appeals arising from Riverside. No final arrangements for compensation have been made yet, but the hope of the public defender is that the district court of appeal will be able to make payments for his services by transferring money to the county out of the fund from which it ordinarily pays private appointed attorneys. In several such appeals the defender has filed a statement in lieu of brief, in which he indicates that he has reviewed the transcript and has found no grounds for appeal. Apparently court-appointed counsel in appeals arising from Los Angeles are being required to file a similar statement setting forth the facts of the case, the issues potentially involved on appeal, and the conclusion, if appropriate, that the appeal is without merit. The Los Angeles County Public Defender, even prior to *Douglas,* took an appeal in a limited number of cases handled by its office at the trial level, but there is no indication that *Douglas* has affected the number of appeals handled by this office."

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FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966
No. 98

CHARLES ROBERT ANDERS,
Petitioner,

vs.

CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT.

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IN THE

Supreme Court of the United States

October Term, 1966
No. 98

CHARLES ROBERT ANDERS,

Petitioner,

vs.

CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT.

Opinions Below.

These proceedings on certiorari arise out of petitioner's 1957 felony conviction for possession of marijuana in Merced County, California. The judgment of conviction was affirmed on appeal by the District Court of Appeal, Third Appellate District, State of California, 3d Crim. 2880, on January 9, 1959, and is reported in 167 Cal. App. 2d 65, 333 P. 2d 854. [Ex. 1, Stip. as to Cont. of Rec.][1]

On January 21, 1965, petitioner's habeas corpus petition to the District Court of Appeal, Third Appellate District, State of California, collaterally attacking the

[1]Exhibit numbers refer to exhibits attached to the Stipulation as to Contents of Record on file herein.

previously affirmed judgment and for reinstatement of appeal, was denied in an unpublished memorandum opinion. [Tr. of Rec. p. 11.][2]

The Supreme Court of California, without opinion, denied petitioner's habeas corpus petition collaterally attacking the previously affirmed judgment and for reinstatement of appeal, on July 14, 1965. [Tr. of Rec. p. 26.]

Jurisdiction.

This Court granted leave to proceed in forma pauperis, and the petition for certiorari herein, on April 4, 1966. Petitioner alleges jurisdiction based upon 28 U.S.C. 1257(3).

Respondent believes this case is extremely close to mootness; but because the remote possibility exists that the instant conviction might affect petitioner in the future, no contention has been raised in that regard.

Petitioner served a prison term for burglary concurrently with a term for possession of narcotics beginning in 1951. In 1957 he commenced another term for possession of marijuana (the instant case). In 1964 he commenced another term for burglary consecutive to the 1957 marijuana term. [See Appendix.]

Under California's narcotic statutes, Health and Safety Code sections 11500 *et seq.*, increased penalties may result on future narcotic felony convictions if prior narcotic felony convictions are pleaded and proved. Thus petitioner, with two prior narcotic felony convictions, conceivably could receive an indeterminate sentence of from fifteen years to life imprisonment were

[2] "Tr. of Rec." refers to the printed Transcript of Record on file herein.

he in the future to be convicted of another narcotic felony. If, however, a new appeal was granted herein, the conviction was set aside, and a new trial resulted in an acquittal, petitioner would then have only one narcotic felony prior conviction. In that case, if he in the future were convicted of another narcotic felony, the penalty could be two to twenty years.

On the other hand, because of his two felony burglary prior convictions and disregarding any narcotic felony prior convictions, his future conviction of any one of a number of non-narcotic felonies[3] might result in an indeterminate life sentence as a habitual criminal. California Penal Code section 644.

Questions Presented.

1. What is the extent of the duty of court-appointed appellate counsel when in his conscientious professional opinion, formed after study of the complete record and consultation with his client, there is no merit to the indigent's first appeal as a matter of right?

2. Does due process or equal protection require court-appointed appellate counsel who has studied the complete trial record, explained and discussed the case with his client, and concluded that the appeal is without merit, to do more than inform the court of his conclusion?

---

[3]The crimes listed in the habitual criminal statute are ". . . robbery, burglary of the first degree, burglary with explosives, rape with force or violence, arson as defined in Section 477a of this code, violence, murder, assault with intent to commit murder, train wrecking, felonious assault with a deadly weapon, extortion, kidnaping, escape from a state prison by use of force or dangerous or deadly weapons, rape or fornication or sodomy or carnal abuse of a child under the age of 14 years, or any act punishable under Section 288 of this code, conspiracy to commit any one or more of the aforementioned felonies, . . .".

3. Does due process require a state appellate court to appoint other counsel for an indigent appellant when counsel first appointed has studied the complete trial record and transcript, has consulted with his client, has concluded that the appeal is without merit, the complete record is before the appellate court, appellant is permitted to file his own brief, and the court's decision is reached and opinion written only after study by the court of such brief and the complete trial record and transcript?

4. Does due process or equal protection require court-appointed appellate counsel to manufacture and present contentions when in his professional conclusion there is no merit to the appeal?

Statement of the Case.

The Trial.

In June, 1957, petitioner Anders and a codefendant, Jones, were charged by information with felonious possession of marijuana in violation of California Health and Safety Code Section 11500. [Tr. of Rec. p. 1.] Both were represented at a jury trial by Merced County Public Defender, Donald R. Fetz, Esq. [Ex. 2, Stip. as to Cont. of Rec., p. 1.]

Anders and Jones were stopped by police for slow driving and weaving causing a traffic jam on a major state highway. Anders was the driver. Jones was sitting to his right. Anders failed to produce a driver's license and was told he would be given a traffic citation. While the police officer was talking to Anders, a package was thrown from the passenger side of the car and landed nearby. Examination of the package dis-

closed three marijuana cigarettes and bulk marijuana sufficient to make about 70 more cigarettes. Anders and Jones were then placed under arrest. The car was then searched. Marijuana debris was found in the car and in clothing in the car belonging to each man. A marijuana cigarette was found in a jacket belonging to Jones. At the police station, marijuana debris was also found in the clothing then being worn by each man. The men also had $94 between them, $24 in ones, $30 in fives, and the balance in larger bills. The going rate for marijuana cigarettes in the area was $1 per cigarette. [Ex. 2, pp. 51-104.]

Neither Anders nor Jones testified at the trial, and comment by the prosecution was made and the court instructed the jury on this point. Each defendant was found guilty as charged. Probation referral was waived and each was sentenced to the state prison for the term prescribed by law (an indeterminate sentence of 6 months to 10 years). [Tr. of Rec. p. 2.]

The Appeal.

Anders filed a notice of appeal. Patrick Murphy, Esq., a member of the California Bar, was appointed to represent him by the California Third District Court of Appeal.

Three copies of the record consisting of a full clerk's transcript containing the court minutes and a full stenographic reporter's transcript were prepared and furnished free of charge: one copy for use of petitioner and his counsel; one for use of the California Attorney General; one for use of the Third District Court of Appeal. This appellate record included:

1. A copy of the information [Ex. 1, pp. 1-2];
2. Voir dire of the jury [Ex. 2, pp. 1-44];

3. Opening statement by the prosecutor [Ex. 2, pp. 45-48];
4. Opening statement by defense trial counsel [Ex. 2, pp. 48-50];
5. Testimony of all witnesses [Ex. 2, pp. 51-104];
6. List of all physical evidence [Ex. 1, pp. 4-5];
7. Opening final argument by the prosecutor [Ex. 2, pp. 105-109];
8. Final argument by defense counsel [Ex. 2, pp. 109-114];
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10. Jury instructions given by the Court [Ex. 2, pp. 116-129];
11. Jury instructions proffered by the parties but refused by the Court [Ex. 1, pp. 9-16];
12. Proceedings relating to return of the jury with the verdict [Ex. 2, pp. 130-131];
13. Copy of the verdict [Ex. 1, p. 17];
14. Proceedings relating to waiver of probation and sentencing [Ex. 2, pp. 132-133];
15. Abstract of judgment and commitment order [Ex. 1, pp. 18-20];
16. Copy of the notice of appeal [Ex. 1, pp. 23-26].

After appointed counsel, Mr. Murphy, examined this extremely complete trial transcript, he concluded that the appeal was without merit. Then he visited and communicated with Anders and explained his views

and opinions to him. Finally, he wrote to the Presiding Justice of the appellate court which had appointed him:

> "This is to advise you that I have received and examined the trial transcript of CHARLIE ANDERS as it relates to his conviction of the crime of possession of narcotics.
>
> "I will not file a brief on appeal as I am of the Opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him as they relate to his appeal.
>
> "Mr. Anders has advised me that he wishes to file a brief in this matter on his own behalf." [Tr. of Rec. p. 6.]

Anders, after discussing the case with Mr. Murphy, wrote the appellate court asking for appointment of other counsel on appeal. [Ex. 5.]

The court advised Anders that it had heard from Mr. Murphy; that new counsel would not be appointed; that he could file a brief himself or let the court decide the appeal on the record. [Ex. 6.] [This was the same detailed record that Anders and his counsel had previously received.]

Anders filed his own brief. [Ex. 8.] Respondent filed a brief. [Ex. 9.] Anders filed a closing Brief. [Ex. 10.]

The District Court of Appeal unanimously affirmed the judgment in a written opinion which carefully considered each issue raised in Anders pro se brief. [Ex. 11.]

The Habeas Corpus Applications.

Anders filed a petition in habeas corpus on January 21, 1965, with the District Court of Appeal that originally affirmed the judgment, for reinstatement of his appeal in the instant matter, urging denial of appellate counsel per *Douglas v. California,* 372 U.S. 353 (1963). [Tr. of Rec. pp. 8-10.] This petition was denied in an unpublished per curiam memorandum opinion:

> "The petition for writ of habeas corpus to reinstate applicant's appeal is denied since the procecedure prescribed by In re Nash, 61 A.C. 538, was followed in this case and this court has again reviewed the record and has determined the appeal was without merit." [Tr. of Rec. p. 11.]

On June 25, 1965, Anders filed a petition in habeas corpus in the California Supreme Court urging denial of counsel under *Douglas* and also improper comment on failure to take the witness stand per *Griffin v. California,* 380 U.S. 609 (1965). [Tr. of Rec., pp. 12-25.] This petition was denied without opinion on July 14, 1965. [Tr. of Rec., p. 26.]

On April 4, 1966, this Court granted Anders leave to proceed in forma pauperis and granted his petition for certiorari. [Tr. of Rec., p. 27.]

Summary of Argument.

The quantum of constitutional due process and equal protection furnished to petitioner by California on his 1958 appeal probably equalled or exceeded the maximum requirements of every other state and federal standard at that time, and even up to the present writing. California furnished petitioner without cost a full clerk's

and stenographic reporter's trial transcript; a lawyer who studied this record and visited and communicated with his client; an appellate court which studied and analyzed this same extensive record after appointed counsel informed it that in his professional judgment the appeal was without merit; an appellate court which did not dismiss the appeal but analyzed the case and each of petitioner's contentions in a detailed written opinion.

Long before *Douglas v. California,* 372 U.S. 353 (1963), counsel was appointed in the instant case solely because an indigent appellant had requested such aid on his first appeal as a matter of right. The court did not make the latter declared error of first looking at the record itself to see if appointment of counsel would be worthwhile.

There is an unavoidable distinction between rich and poor because of the nature of the appointed counsel system. The laywer for the paying client can inform his client in *confidence* of his professional opinion that the appeal is without merit; however, the lawyer appointed to represent the indigent appellant must also report his conclusion back to the court so that the appellate process can continue.

He can report to the court in three ways: (1) by a simple "no-merit" letter, as in the instant case, which least psychologically prejudices the court against his client's case; (2) by a detailed memorandum justifying his conclusion and proving how hopeless his client's case really is; or (3) by writing the same brief he might write if the paying client insisted on spending his money with full knowledge that the ultimate result would be affirmance of the judgment.

Under the no-merit letter method, the indigent is fully protected because an advocate has been placed as a shield between the record and the court. If there is any hidden error or argument to marshal, he does so in a brief; however, when there is no merit he merely so advises the court, and then, in California, the court itself reads and analyzes the record and writes its opinion, resulting in a further check on the attorney's professional conclusion.

The detailed memorandum method, followed in the the District of Columbia, is based on a distrust by the court in the integrity and ability of counsel it appoints. An acceptance of a memorandum written by such counsel results in dismissal of the appeal without the court ever seeing the complete record. This second method implies deprivation of constitutional due process and equal protection where the court reaches its decision based upon material coming from an untrustworthy source.

The written brief method merely prolongs the final return of the remittitur, for if there is no merit to the case, the result will necessarily be the same for a rich or a poor appellant. The rich man merely buys a stall for time; he can be out on bail pending appeal. But the poor man in jail may be actually harmed by such a stay in those instances where the prison sentence does not commence until the appeal is final.

Under the California no-merit letter method, where the appellate court itself studies the full record, there is no invidious distinction between rich and poor, and neither due process nor equal protection requires appointment of more than one counsel for the indigent appellant.

ARGUMENT.

I,

Petitioner Received Every Element of Due Process and Equal Protection, Including Some Requirements Not Even Enunciated by This Court Until Years Later, When in 1958, He Took His First Appeal as a Matter of Right.

When, in 1958, petitioner took his first appeal as a matter of right from his conviction for possession of marijuana, California gave him every element of due process and equal protection, including some requirements not even enunciated by this Court until years later.

He was furnished a *full* trial transcript, the more expensive state alternative set out in *Griffin v. Illinois*, 351 U.S. 12, 19-20 (1956), and received free and entirely at the expense of the State of California a copy of the information, the detailed voir dire of the jury, the opening statements of prosecution and defense counsel, the examination and testimony of all witnesses, the list of physical evidence, the closing arguments of counsel for each side, the jury instructions given and refused, the proceedings at the return of the verdict, the poll of the jury, a copy of the verdict, the proceedings relating to waiver of probation and sentencing, a copy of the abstract of judgment and commitment order, a copy of the notice of appeal, and a copy of all the clerk's minutes involved in the case.

He did not have to pay any filing fee to appeal his conviction.

See,

Burns v. Ohio, 360 U.S. 252 (1959);
Smith v. Bennett, 365 U.S. 708 (1961).

He received appointed counsel without cost who studied the full record, communicated with him, visited him and discussed the case with him. The appellate court, therefore, was not ". . . forced to prejudge the merits [of the case] before it [could] even determine whether counsel should be provided." See *Douglas v. California*, 372 U.S. 353, 356 (1963).

Petitioner also received something additional on his appeal which this Court has not even yet enunciated as a constitutional requirement of either due process or equal protection.

Although his appointed counsel concluded the case was without merit, he still received full appellate review.

See,

Lane v. Brown, 372 U.S. 477 (1963).

See also,

Draper v. Washington, 372 U.S. 487 (1963);

Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214 (1958).

A copy of the entire clerk's transcript and stenographic reporter's transcript previously referred to, which had already been studied by appointed counsel, was also on file with the appellate court. When counsel informed the court of his conclusion that there was no merit to the appeal, the record was nevertheless carefully researched and studied by the court before it reached its decision and wrote its opinion. See Appendix B of Petitioner's Brief herein which points out that the practice followed before *Douglas v. California, supra*, 372 U.S. 353 (1963), by this very same Third District Court of Appeal which had Anders' appeal be-

fore it, even in cases like this where counsel had written a no-merit letter, was to have a research attorney and the judge assigned to write the opinion go over the case and examine the transcript before the entire court finally decided the case.

II.

In Petitioner's 1958 Appeal, the Appellate Court Appointed Counsel for Him by Virtue of the Fact He Was an Indigent, and It Did Not Make the Later Douglas v. California Error of Conducting Its Own Preliminary Ex Parte Examination of the Record to First Determine if the Case Had Merit Before It Would Make the Appointment.

In 1958, five years before *Douglas v. California, supra,* 372 U.S. 353 (1963), declared it was error for an appellate court to conduct its own preliminary ex parte examination of the record to determine if the case had merit enough to warrant appointment of counsel, the California Third District Court of Appeal in this case *did not make that error.* After the record was filed with that court, it appointed counsel for petitioner before it made any determination on the merits, merely by virtue of the fact that he was an indigent who had appealed a criminal case.

In *Douglas,* this tribunal set as the nationwide standard of appellate due process, the same standard followed by the Third District Court of Appeal in Anders' case in 1958. *Douglas* required that an appellate court must appoint an attorney for an indigent who would be a shield between the record and the court's initial determination of the merits of the case.

Douglas required the court, *before* it made any determination on the merits of the appeal, to appoint appel-

late counsel who would give the poor man the same treatment he would give the paying client; counsel who, as an advocate, would examine the record, research the law, and marshal arguments to the court on his client's behalf for correction of any overt or hidden error *he could discover.*

In *Douglas,* this court said:

> ". . . If he cannot [pay] the *appellate court is forced to prejudge the merits before it can even determine whether counsel should be provided. At this stage in the proceedings* only the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is forced to go without a champion on appeal. Any real chance he may have had of showing that his appeal has hidden merit is deprived him *when the court decides on an ex parte examination of the record* that the assistance of counsel is not required." (Emphasis added.) (p. 356.)
>
> "When an indigent is forced to run this gantlet of *a preliminary showing of merit,* the right to appeal does not comport with fair procedure." *Douglas v. California, supra,* 372 U.S. 353, 357 (1963). (Emphasis added.)

In the instant 1958 case, the Third District Court of Appeal appointed Mr. Murphy as the shield between the record and the Court's initial determination of the merits. Mr. Murphy, as an advocate, studied the record, and consulted with his client; but he could find no merit to the appeal, and thus there were no arguments which he could marshal on his client's behalf.

We submit that in 1958, Anders' appellate treatment complied with the constitutional standards of due process and equal protection later set up in *Douglas v. California, supra.*

III.

Petitioner Received the Appointment of Competent Counsel Who Was as Effective an Advocate as Possible Under the Circumstances, in View of the Utter Lack of Merit to the Appeal.

A. California Agrees That There Must Be No Invidious Distinction Between Rich and Poor in the Administration of Criminal Justice.

Certainly, California agrees with the proposition set forth in *Griffin v. Illinois,* 351 U.S. 12 (1956), and reiterated in *Douglas v. California,* 372 U.S. 353 (1963), that there must not be any invidious distinction between rich and poor in the administration of criminal justice, and also with the proposition that appointment of appellate counsel means the indigent must receive adequate representation, *Ellis v. United States,* 356 U.S. 674 (1957), by counsel acting as an effective advocate on the indigent's first appeal as a matter of right. See *Cruz v. Patterson,* 253 Fed. Supp. 805 (1960) adopted on August 8, 1966, as the opinion of the Tenth Circuit Court of Appeals in *Patterson v. Cruz,* 10th Cir. No. 8726, July Term, 1966,.... F. 2d ..... Cert. denied December 5, 1966, 35 L. Week 3201, ... U.S. .....

The *Cruz* case is interesting because it illustrates a situation deceptively similar to the instant case, but clearly distinguishable, and which points up the distinction between an amicus curiae and an advocate.

On his initial 1959 appeal, Cruz, unlike Anders, was denied appointment of appellate counsel. His pro se appeal was affirmed on the merits in 1962 by the Colorado Supreme Court.

After *Douglas* was decided, Cruz petitioned the Colorado trial court in habeas corpus, contending he should be released as he was denied due process and equal protection when he was not furnished any appellate counsel on his initial appeal. The trial court denied this petition and the Colorado Supreme Court affirmed this denial of the habeas corpus petition by the trial court.

Because of the "peculiar circumstances," however, the Colorado Supreme Court ordered the trial court to appoint counsel with instructions to him to examine the record and determine if all original points urged by Cruz in pro se were adequately raised and if any new points could be discovered. If counsel felt the briefs were inadequate or if he found any new points, he was to file a supplemental brief on Cruz's behalf.

Counsel reported back that he could find no new points and all points raised had been completely reviewed by the Colorado Supreme Court.

The Colorado Supreme Court then adhered to the decision it had rendered on the first appeal, declined to appoint other counsel in the case, and reaffirmed its previous judgment in the matter (denying the habeas corpus petition). (See *Cruz v. Colorado,* .... Colo. ...., 401 P. 2d 830 (1965).)

Cruz then petitioned the Federal District Court in habeas corpus. That court granted the petition on the ground that counsel had acted as an amicus curiae instead of an advocate. It believed the Colorado Su-

preme Court's order limited counsel to a reviewing, advisory function whereby he had to determine if the 1962 existing Opinion was correct.

If the *Cruz* case had arisen in California, the state habeas corpus petition based on the pre-*Douglas* denial of appellate counsel would have been summarily granted without first appointing counsel to study the record and report his findings to the court.

Under the California post-*Douglas* appellate practice, habeas corpus petitions are summarily granted where pre-*Douglas* denials of appellate counsel occurred. In those cases, the remittitur is recalled, the original judgment and opinion are vacated, counsel is appointed, a record is furnished to him and the matter is treated as an original appeal.

See for example:

People v. Collins, 220 Cal. App. 2d 563, 565-566, 33 Cal. Rptr. 638, 639-640, 255 P. 2d 59 (1963);

People v. Cooper, 221 Cal. App. 2d 448, 450, 34 Cal. Rptr. 519-520 (1963);

People v. White, 239 Cal. App. 2d 355, 356, 48 Cal. Rptr. 756, 757 (1966).

It appears that the *Cruz* case result in the Federal District Court occurred because that Court apparently thought Colorado should have given absolute retroactive application to *Douglas v. California,* 372 U.S. 353 (1963). See *Donnell v. Swenson,* 258 Fed. Supp. 317 (U.S.D.C. W.D. Mo. 1966).

Under the Federal District Court analysis, counsel was appointed by the Colorado Court to see if the original Opinion should have been vacated. If counsel did

not reach that conclusion, *Cruz* would never receive his first appeal as a matter of right with representation by counsel. Under this analysis, any counsel who studied the case to see if it should be reopened could be looked upon only as an amicus regardless of how much energy he exerted on the indigent's behalf.

The *Cruz* case in some respects resembles *Lane v. Brown,* 372 U.S. 477 (1963), where the determination of the Illinois Public Defender that the coram nobis petition had no merit precluded the indigent from any appeal whatever. Cruz was entitled to a new appeal under *Douglas* if it is absolutely retroactive; the report of counsel that there were no new issues, and all previous issues had been adequately briefed, deprived Cruz of that new appeal.

B. California Disagrees With Petitioner's Suggestion That Minimum Standards of Due Process Require Marshalling of Some Argument on Behalf of the Indigent Even Though Competent Counsel Can Discover No Error in the Record.

We also agree that effective advocacy includes ". . . counsel's examination [of the] record, research of the law, and marshalling of arguments on his [the indigent's] behalf." *Douglas v. California,* 372 U.S. 353, 358 (1963).

But we take strong issue with the line of reasoning which concludes that *even though there is no error to be found in the trial record,* counsel is derelict in his duty, or at most is scornfully referred to as an "amicus," unless he marshals *some* arguments in his client's behalf.

We submit that *if there is no error, there are no arguments to be marshalled.* And in the instant case, there was no error recognizable in the record at the time the appeal was taken in 1958.

Mr. Murphy, appointed counsel, studied the record, communicated and consulted with his client, and formed the professional judgment that the appeal was without merit. It is significant, in this connection, that his conclusion has never been overturned.

The three judges of the Third District Court of Appeal who studied the full and complete record found no merit when they initially affirmed the judgment. [Ex. 11.]

When the case came up on the habeas corpus petition in 1965, three other[4] judges of the Third District Court of Appeal again reviewed the record and again determined the appeal was without merit. [Tr. of Rec. p. 11.] And petitioner's present counsel on certiorari has also been unable to discover any merit to the appeal.

By now, at least six lawyers (two for petitioner, two for the State of California, and two court research attorneys) and six impartial appellate justices have made a detailed study of the record and applicable law and still have found no grounds for which argument should have been marshalled in a brief on behalf of petitioner in 1958.

True, today we can look at the record and see that it contains the prosecution comment and jury instruction on failure of the defendant to testify which was con-

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[4]The three original justices were Peek, Schottky and Warne. [Ex. 11. p. 4.] On habeas corpus, the court consisted of Justices Pierce, Friedman and Regan. (231 Cal. App. 2d, p. iv.)

demned in *Griffin v. California,* 380 U.S. 609 (1965). [Ex. 2, pp. 107-108, 114-115, 119-120.] But even that error is not applicable to cases such as the instant one which were final prior to the date of the *Griffin* decision. *Tehan v. Shott,* 382 U.S. 406 (1966).

It is conceivable that some lawyer may still search the record and now find an argument which should have been raised in 1958; but we submit that if such an argument were first to be found now, after the extensive examination this record has received to date, the discovery would only emphasize the competency and adequacy of counsel appointed by California to represent petitioner on his first appeal as a matter of right.

C. California Disagrees With the Suggestion That Minimum Standards of Appellate Due Process Require Appointed Counsel to Urge Reversal or Distinction of Long Existing Law Merely Because the Subject Remotely Exists in the Record.

Petitioner's implied suggestion that Mr. Murphy was derelict in his duty for not writing a brief at least advocating the overruling or distinction of *Adamson v. California,* 332 U.S. 46 (1947), is in reality the argument that minimum effective appellate advocacy for due process purposes requires appointed counsel in every case to attempt the overruling or distinction of *all* prior decisions which might be said to curtail defendants' constitutional rights; of his own state's highest court as well as of this Court, if anything exists in the record relative to the subjects covered.

In the instant case, to take some obvious examples, petitioner was charged by information instead of in-

dictment; the arrest, although without a warrant, was clearly based upon probable cause; the search of the car, also without a warrant, was clearly incidental to the arrest. Can it now be reasonably urged that Anders did not receive due process because Mr. Murphy in 1958 failed to write a brief urging the overruling or distinction of longstanding principles of law recognizing the constitutional validity of such practices? We do not think so.

The list of possible arguments which could be raised on any appeal varies in direct proportion to the depth of the legal analyst's imagination. But it should not be said that failure to raise and brief them because the evidence of the particular rules exist in the record in the abstract, is any denial of due process.

Nor is it proper to urge that appointed counsel should only raise such arguments when there is nothing else that may be said in the indigent's behalf. For if the arguments are any good at all, they should be urged in every case, lest the claim be later raised by other appellants that they were also deprived of due process because appointed (or paid) counsel did not brief all the possible issues conceivably existing in the record.

We submit that on his 1958 appeal Anders received the appointment of a competent advocate who was as effective as possible under the circumstances, in view of the utter lack of merit to the appeal.

IV.

Where the Appellate Court Not Only Has Confidence in the Integrity and Ability of Counsel It Appoints to Represent Indigent Appellants, but Additionally Examines the Entire Record and Carefully Researches Applicable Law Before Deciding the Case and Writing Its Opinion, Due Process and Equal Protection Do Not Require Any Additional Checks When Appointed Counsel Concludes as an Advocate That the Appeal Is Without Merit and so Notifies the Court.

Petitioner first argues that Mr. Murphy, his appointed appellate counsel, was derelict in his duty and acted as an adversary because he told the court that in his opinion there was no merit to the appeal; but then petitioner diametically argues that Mr. Murphy did not go far enough and should have filed a confidential memorandum with the court analyzing the case legally with citations of authority to back up his conclusion that his client had no case.

The first argument is made by petitioner to criticize the procedure followed in the instant case in 1958, and which was later approved by the California Supreme Court after *Douglas v. California,* 372 U.S. 353 (1963).

In *In re Nash,* 61 Cal. 2d 491, 39 Cal. Rptr. 205, 393 P. 2d 405 (1964), the situation was almost identical with what had occurred in the instant case over five years previously. In *Nash,* the Court said, per Justice Traynor:

> "Petitioner contends that he was denied effective representation of counsel on appeal when the counsel appointed to represent him informed the court that he could find no meritorious grounds of

appeal and refused to file a brief or argue the case orally. He contends that the appellate court should have appointed another counsel to represent him or, at least, formally relieved counsel of his assignment and offered petitioner the opportunity personally to present oral as well as written argument.

"In *Douglas v. State of California,* 372 U.S. 353 [83 S.Ct. 814, 9 L.Ed.2d 811], the United States Supreme Court held that it was a denial of equal protection of the laws to refuse to appoint counsel to represent an indigent defendant on his appeal from a criminal conviction. (See also *Vasquez v. District Court of Appeal,* 59 Cal.2d 585, 586-587 [30 Cal.Rptr. 467, 381 P.2d 203].) We believe that the requirement of the *Douglas* case is met, however, when, as in this case, counsel is appointed to represent the defendant on appeal, thoroughly studies the record, consults with the defendant and trial counsel, and conscientiously concludes that there are no meritorious grounds of appeal. If thereafter the appellate court is satisfied from its own review of the record in the light of any points raised by the defendant personally that counsel's assessment of the record is correct, it need not appoint another counsel to represent the defendant on appeal and may properly decide the appeal without oral argument. (See *Federal Communications Com. v. WJR,* 337 U.S. 265, 276, 283-284 [69 S.Ct. 1097, 93 L.Ed. 1353, 1360, 1364-1365]; *Dyke Water Co. v. Public Utilities Com.,* 56 Cal.2d 105, 125 [14 Cal.Rptr. 310, 363 P.2d 326].)

"This procedure, which was adopted by the District Court of Appeal in this case, afforded petitioner substantially the same representation by counsel on appeal as is afforded indigent federal prisoners seeking to appeal in forma pauperis. (See *Coppedge v. United States,* 369 U.S. 438, 446 [82 S.Ct. 917, 8 L.Ed. 2d 21, 28-29]; *Ellis v. United States,* 356 U.S. 674, 675 [78 S.Ct. 974, 2 L.Ed.2d 1060, 1061]; *Johnson v. United States,* 352 U.S. 565, 566 [77 S.Ct. 550, 1 L.Ed.2d 593, 594]; *United States v. Pravato,* 282 F.2d 587, 591; *Porter v. United States,* 272 F.2d 695; see also *State* ex rel. *White v. Hilgemann,* 218 Ind. 572, 578-579 [34 N.E.2d 129]; *People v. Brown,* 55 Cal.2d 64, 73-74 [9 Cal.Rptr. 816, 357 P.2d 1072]; concurring opinion; *People v. Linden,* 204 Cal.App.2d 745 [22 Cal.Rptr. 633].) Admittedly, it does not insure exact equality between indigent defendants and those who have ample funds to retain counsel, for undoubtedly a defendant with sufficient funds could ultimately find counsel to brief and argue even the most frivolous appeal. Exact equality, however, is impossible to attain (see *McGarty v. O'Brien,* 188 F.2d 151, 155, 157; *United States v. Baldi,* 192 F.2d 540, 547, affd. 344 U.S. 561, 568 [72 S.Ct. 391, 97 L.Ed. 549, 556]), and the United States Supreme Court recognized in the *Douglas* case that it is not required; that only 'invidious discrimination' denies equal protection. (*Douglas v. State of California,* 372 U.S. 353, 356-357 [83 S.Ct. 814, 9 L.Ed. 2d 811, 814]; see also *Norvell v. Illinois,* 373 U.S. 420, 423-424 [83 S.Ct. 1366, 10 L.Ed. 2d 456, 459].) Competent counsel was appointed to represent peti-

tioner on appeal. He was not subject to invidious discrimination because neither that counsel nor the District Court of Appeal could discover a meritorious ground of appeal and the court therefore refused to appoint another counsel to represent him."

In re Nash, supra, 61 Cal. 2d 491, 495-496 (1964).

Petitioner's first argument, that appointed appellate counsel who notifies the court the case is without merit is an adversary, fails to take into account the indigenous aspect of every court-appointed appellate counsel system which of necessity differentiates it from the privately retained counsel situation.

In the private retainer situation, the lawyer's professional conclusion that the case is without merit is communicated in *confidence* to the client. If the client wants to spend his money to have this counsel or another counsel prepare a brief for the court to read, he may do so; however, he knows *the eventual result will be affirmance of the judgment.* What the client really buys with his money is a postponement of service of his sentence so long as his lawyer can forestall the return of the remittitur to the trial court.

If the same client has no money to pay the fee, and the court appoints the same lawyer to represent him, the no-merit conclusion would necessarily be the same as before; however, this time the lawyer would not only tell his client his conclusion, but he would also have to report it back to the court that appointed him. To this extent, the traditional confidential lawyer-client relationship cannot exist under the appointed counsel system.

Since appointed counsel has to tell the court something, in order for the appellate process to continue, it would appear that three courses are open to him, when, after study of the record, and consultation with his client, he concludes in his best professional judgment the appeal is without merit.

(1) He can write a simple no-merit letter, as was done in the instant case, which informs the court only of his conclusion. In California, this leaves the appeal to continue; it is not dismissed, and the court which reads the full record and analyzes the applicable law is thus psychologically unprejudiced by an array of principles of law and argument mustered against the client solely to justify the attorney's conclusion.

(2) He can file the detailed District of Columbia type memorandum, proving to the court that he has done his "homework" and at the same time mustering all the authorities proving his client has no case.

It is difficult to reconcile this method with the constitutional requirement for advocacy, particularly where, as in the District of Columbia, the court, which does not read the entire record, dismisses the case if the memorandum is strong enough.

(3) He can write the same brief he might write if the client was paying his fee. But the indigent client will gain nothing, and in some instances may even be harmed. For regardless of what appointed counsel puts into the brief, if the case has no merit, the judgment will necessarily be eventually affirmed. And in those situations where the prison sentence does not commence until the remittitur is returned to the trial court, the indigent client who has not been able to post

bail pending appeal will have served a lengthy period of what is commonly referred to as "dead time."

As a corollary to this, are two propositions: (a) since the only difference between the man who can pay and the indigent appellant in California is the stall for time, the distinction between the two economic groups is not invidious; (b) any brief filed will necessarily be frivolous when there is no merit to the appeal.

Petitioner's second argument, in favor of a detailed analysis of the record to back up appointed counsel's conclusion of no merit, is based upon two cases in the Court of Appeals for the District of Columbia: *Tate v. United States,* 359 F. 2d 245 (D. C. Cir. 1966) and *Johnson v. United States,* 360 F. 2d 844 (D. C. Cir. 1966).

Both *Tate* and *Johnson,* however, deal with entirely different situations from petitioner Anders' case.

In the *Tate* and *Johnson* type of case, there is generally no transcript of the record before the appellate court before or after counsel is appointed. *Bond v. United States,* 360 F.2d 504, U.S.C.A. (D. C. Cir. 1966).[5] In the instant case, however, petitioner received free, and there was at all times before the appellate court, an extremely extensive and complete

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[5]See also: "SUGGESTIONS TO COUNSEL APPOINTED BY THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN CRIMINAL CASES AND IN CASES UNDER 28 U.S.C. SEC. 2255" dated January, 1964, prepared by the Legal Aid Committee of the Bar Association of the District of Columbia, which the Clerk of the United States Court of Appeals for the District of Columbia Circuit has advised respondent is given to appointed counsel in that circuit at the time of their appointment.

clerk's and stenographic reporter's transcript. (See Resp. Br., pp. 5-6, *supra.*)

Under the *Tate* and *Johnson* situations, upon counsel's advising the appellate court that in his opinion the appeal is without merit and his being granted leave to withdraw, unless the appellant proceeds in pro se, the appeal is dismissed. Under the California procedure exemplified in the instant case, however, the appeal continues whether the appellant writes a brief or not, and at least one research attorney and the judge assigned to write the opinion carefully study the complete transcript and research the applicable law before the decision of the full appellate court is made and the opinion issued. (See pages 12-13, *supra*, and Petitioner's Brief. Appendix B.)

Petitioner suggests, as a minimum standard of due process, the District of Columbia *Tate* and *Johnson* method: having court-appointed counsel (whose ability and integrity may be in doubt)[6] write a detailed analysis of why the case has no merit; then, after reading this memorandum, and *without looking at the clerk's and stenographic reporter's transcripts, the appellate court, if convinced by the memorandum, dismisses the appeal.* It is difficult to see how such a system encourages advocacy.

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[6]See: *Defense of the Poor in Criminal Cases in American State Courts,* Volume 2, State Reports (Silverstein, Ed. American Bar Foundation 1965), referred to in Appendix B of Petitioner's Brief. At page 141, under the appendix to the section on the District of Columbia practices, which gives comments of some members of the District Bar, in the view of at least one participating member of that Bar, about one lawyer out of every ten appointed in the District is either incompetent or indigent himself.

Petitioner's analysis stems from a gross distrust in the integrity and ability of the members of the bar appointed by appellate courts to represent indigent appellants. Petitioner argues that many appointed counsel will view the appointment as a nuisance, many others will act as an amicus and weigh the time burden imposed on court and counsel if full argument is presented, and still others will have different reasons for not briefing a case where the estimate of the chances of success are slim.

Respondent respectfully suggests that if an appellate court has little or no faith in the integrity and ability of the attorney it appoints to represent an indigent, but nevertheless utilizes only a report or analysis filed with the court by that same attorney, without itself looking at the full record and transcript, then such a court may very well be depriving its indigent appellants of due process and equal protection.

We suggest that the California system, used in the instant case and approved in *In re Nash, supra,* 61 Cal. 2d 491 (1964) is at least, and perhaps even more equitable and just in terms of due process and equal protection than the memorandum system. Under the California system, whether counsel writes a brief or says there is no merit, the court does not dismiss the appeal, but the court itself reads the entire record and researches the law, after which it writes its opinion.

Unlike the situation pertinent to appeals in the federal system discussed in *Coppedge v. United States,* 369 U.S. 438, 447-48 (1962), appeals in California are generally not dismissed for frivolity.

It is submitted that whether a court has confidence in its appointed counsel or not, the check of the court

itself reading the full record, used in California for all appeals by rich as well as poor, is certainly as valid as the required memorandum system and does not give rise to implications of violation of due process which may exist under that procedure.[7]

The California method of handling indigent appeals appears to be followed in Arizona, *State v. Burrell,* 96 Ariz. 233, 393 P. 2d 921 (1964); in Colorado, *Stanmore v. Colorado,* ....Colo. ...., 401 P. 2d 829 (1965); in Connecticut, *Fredericks v. Reincke,* 152 Conn. 501, 208 A. 2d 756, 758 (1965); in Indiana, *In re Sowders,* .... Ind. ...., 207 N.E. 2d 629 (1965); in New Mexico, *Morales v. Cox,* 75 N. Mex. 468, 406 P. 2d 177 (1965); in Oregon, *Speers v. Gladden,* 237 Ore. 100, 390 P. 2d 635, 636 (1964). The Circuit Court of Appeals for the Fifth Circuit also follows the California procedure. *Rumph v. United States,* 343 F. 2d 580 (5th Cir. 1965)[8]

We submit that the additional feature of the California system where the court also reads the full rec-

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[7]For examples of courts which evidently have confidence in the ability and integrity of their appointed bar and consequently can properly accept detailed memoranda from such counsel, see *United States v. Camodeo,* 367 F.2d 146, U.S.C.A. (2d Cir. 1966); *Stansbury v. United States,* 358 F. 2d 717, 718 U.S.C.A. (5th Cir. 1966); *State v. George,* 98 Ariz. 290, 403 P. 2d 932 (Ariz. 1965); *Petition of Stillabower,* .... Ind. ...., 210 N.E. 2d 665 (Ind. 1965).

[8]Where the circumstances may be somewhat similar and a possible *contra* view exists, see *Hammershoy v. Commonwealth,* 398 S.W. 2d 883 (Kentucky, 1966), and *Commonwealth ex rel. Cunningham v. Maroney,* 421 Pa. 157, 218 A. 2d 811 (Pennsylvania, 1966); see also, *Selman v. Alaska,* 409 P. 2d 602; *Utah v. Montez,* 17 Utah 2d 299, 410 P. 2d 764; *Clark v. Peyton,* ..... Va. ....., 150 S.E. 2d 533 (Virginia. 1966); *McLaughlin v. Wisconsin,* ..... Wisc. ....., 145 N.W. 2d 153, 154-155 (Wisconsin, 1966).

ord, goes even further than this Court's test handed down in *Ellis v. United States,* 356 U.S. 674 (1958):

> "But representation in the role of an advocate is required. If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied."

In the instant case, Mr. Murphy studied the record, visited his client, consulted with him, concluded there was no merit and then notified the court of his professional conclusion. *Still, the appeal was not dismissed.* Appellant filed his brief pro se; then at least one court research lawyer and the judge assigned to write the opinion thoroughly studied the full record and researched the applicable law, and finally the entire court issued its detailed opinion affirming the judgment.

Appointed counsel offered representation as an advocate. After conscientious investigation, he was convinced that the appeal was without merit. Finally, the court itself read the record, researched applicable law, and was satisfied that counsel had diligently investigated all the possible grounds of appeal. Only then, after the court reached the same conclusion, did the court issue its opinion.

Where the California system used in the instant case is followed, and, after appointed counsel notifies the appellate court of his professional conclusion that the appeal is meritless, the appellate court nevertheless it-

self studies the full record and researches the law, both due process and equal protection requirements are met, without any invidious distinction existing between the rich and the poor appellant.

Conclusion.

California guaranteed petitioner as much or more due process and equal protection on his 1958 appeal than do most state and federal tribunals up until the present time, by furnishing him competent appellate counsel and a full clerk's and stenographic reporter's trial transcript which was studied by counsel as an advocate, and an appellate court that itself read the entire record before writing its opinion reaching the same conclusion reached by appointed counsel that the case was without merit.

Under the California appellate system, where the appellate court itself reads the full clerk's and stenographic reporter's transcript and then writes its detailed written opinion in the case, the indigent is as fully protected as under the District of Columbia system, where counsel writes a detailed memorandum telling the court how meritless the case really is and the court dismisses the appeal based on that memorandum, or under the written brief system, where counsel writes the same brief he would for a paying client but he and his client both know it is only a stall for time and that the judgment will eventually be affirmed.

Under the California appellate system, neither due process nor equal protection requires appointment of another lawyer when counsel first appointed finds no merit to the appeal.

For the foregoing reasons, the Order of the Supreme Court of California denying petitioner's application for habeas corpus relief should be affirmed.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General, of the State of California,

WILLIAM E. JAMES,
Assistant Attorney General of the State of California,

GEORGE J. ROTH,
Deputy Attorney General, of the State of California,

Attorneys for Respondent.

APPENDIX.

[Letterhead]

December 27, 1966

Re: ANDERS, Charlie A-42880

Office of the Attorney General
600 State Building
Los Angeles, California

Attention: George Roth, Deputy Attorney General

The following information is submitted per your phone request on December 23, 1966.

Charlie Anders was originally received by the Department of Corrections on July 18, 1951 under commitment from the Superior Court of Los Angeles County for the offense of Burglary 1st (459-Penal Code) (Probation Revoked) and Possession of Narcotics (11500 Health & Safety Code) and prior felony conviction to run concurrently; that on February 24, 1954 he was released on parole. On August 6, 1954 he was returned to the Department of Corrections as a Parole Violator to finish term and was finally discharged on January 20, 1957.

On August 12, 1957 he was received at the California State Prison at Vacaville under commitment from the Superior Court of Merced County for the offense of Possession of Narcotics (11500 Health & Safety Code and released on parole on August 31, 1959.

On June 16, 1960 he was received at the California State Prison at San Quentin as a Parole Violator to finish term and again released on parole on August 12, 1962.

On January 22, 1964 he was received at the California State Prison at Chino as a Parole Violator with new term of Burglary 2nd (459-Penal Code) and two prior felony convictions consecutive with prior term from the Superior Court of San Bernardino County after being at large for one year, 2 months and 22 days.

On January 13, 1966 he appeared before the Adult Authority at which time his terms were fixed at 7 years and 3 years consecutive and granted parole effective July 22, 1966 with a Special Condition "To go to family in Michigan.

On July 13, 1966 the Adult Authority rescinded the action fixing term and granting parole due to inmate having been rejected by Michigan for "Out of State" placement and he was placed on the January, 1967 Adult Authority Calendar for further consideration.

I trust the above covers all the necessary information needed for your purpose. Please feel free to contact the undersigned if we may be of further assistance.

Very truly yours,

ARTHUR L. OLIVER, WARDEN

/s/ GLEN E. SMITH,
Glen E. Smith,
Records Officer III

ALO:GES:er

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suffice to assure an indigent a conscientious decision by appointed counsel not to brief or argue the case. Third, that in any event an indigent receives an adequate review on the merits by the appellate court despite the fact that he is unrepresented.

All three assumptions, in petitioner's view, are erroneous.

First, there is no evidence to suggest that all appointed attorneys act conscientiously, although undoubtedly a great number of appointed counsel do so. Petitioner's point, however, is that a procedure more adequate than California's is necessary to assure diligent effort.

Second, where a conclusory no-merit letter is filed under the California procedure, the appellate court receives a "cold record" supported at best by the indigent's *pro se* brief, such as it is. No professional effort focuses the court's attention (or the attention of a research-attorney law clerk) on the critical question—whether there are non-frivolous legal issues which require lawyer advocacy. The procedure is not an adequate check on the efforts of appointed counsel because the question, invariably, at the appellate court level is whether or not the conviction should be reversed, not whether an attorney should brief and argue the case.

The District of Columbia practice, on the other hand, focuses on whether the lawyer should proceed. This provides a much greater stimulus to conscientious effort. The attorney does not have the opportunity to avoid preparing a brief. The criteria of frivolity (which excuse the attorney from proceeding) are much more demanding than the criteria for affirmance, especially as the court does not have the benefit of counsel-prepared arguments. Thus the "temptation" to refuse to proceed is much reduced.

Third, under the California system some indigents will not in fact receive the adequate appellate review required by *Douglas* v. *California*, 372 U.S. 353 (1963), because there will be instances where non-frivolous issues are rejected in appellate proceedings in which an indigent is not represented by counsel.

The recent case of *Patterson* v. *Cruz*, 363 F.2d 879 (10th Cir. 1966) (adopting the opinion of the District Court, 253 F. Supp. 805) is persuasive in this regard. Prior to *Douglas* v. *California* an indigent defendant was denied appointed counsel on his appeal. The conviction was affirmed. The indigent later sought state habeas corpus and the Colorado Supreme Court appointed an attorney to determine whether reviewable reversible error had occurred which had not adequately been brought to the Court's attention in the indigent's original *pro se* brief. The attorney reported that there was no error. Habeas was denied and the original conviction was "reaffirmed." The indigent then successfully sought federal habeas relief. *Cruz* v. *Patterson*, 253 F. Supp. 805 (D.C. Colo. 1966). The court concluded that counsel had acted as an *amicus* to "screen" the case for the state court. It found this "screening" process analogous to that found invalid in *Lane* v. *Brown*, 372 U.S. 477 (1963). The *Cruz* court said:

> "The procedure followed in the present case likewise conferred upon an attorney, appointed by the Colorado courts, the power to deprive the indigent defendant of the right to have his case presented to the appellate court by an attorney acting as an advocate of his client's cause." 253 F. Supp. at 809-810.

This passage is also applicable to the California procedure. Appointed counsel "screens" the indigent's case and

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 98

CHARLES ROBERT ANDERS,

Petitioner,

—VS.—

CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

REPLY BRIEF FOR PETITIONER

Respondent's primary argument is that equal protection and due process requirements are met by the California procedure because an indigent is only deprived of support of counsel on appeal when (a) appointed counsel, after conscientious investigation as an advocate, concludes that the appeal has no merit and (b) the court itself studies the full record and researches the law before affirming the conviction.

Respondent's argument is based on three assumptions. First, that counsel will act as a conscientious advocate. Second, that the appellate court's review of the record will

if he concludes that there is no merit the appellate court proceeds to determine the appeal on the merits without counsel representing the indigent whether or not the indigent's points are frivolous.

Respondent ingeniously argues that under the District of Columbia practice an indigent has both the government and his own appointed defense counsel advocating against him when appointed attorney files a memorandum to show why the case has no merit. Respondent states that: "It is difficult to see how such a system encourages advocacy" (Resp.'s Brief, p. 28). Respondent's point is sounder theoretically than practically. The District of Columbia procedure encourages advocacy on the merits because it imposes substantial obstacles to attorney withdrawals. This is where the California practice fails.

In any event, the District of Columbia practice is not urged necessarily as a constitutional solution. It is cited primarily to show concern by a highly respected court and what seems to that court a practical alternative to balance, on the one hand, protection of indigents on appeal and, on the other, the professional duty of lawyers not to burden the courts with frivolous cases. It might well be, as suggested in the brief of the State of Iowa in the companion case to the instant one, *Entsminger* v. *Iowa,* No. 252, that a motion for leave to withdraw should be made to the trial court which, if the motion is granted, should appoint another attorney.

Respectfully submitted,

IRA MICHAEL HEYMAN
Counsel for Petitioner

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IN THE

Supreme Court of the United States

JUN 2 1967

JOHN F. DAVIS, CLE

October Term, 1966
No. 98

CHARLES ROBERT ANDERS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

RESPONDENT'S PETITION FOR REHEARING.

THOMAS C. LYNCH,
Attorney General of the State of California,

WILLIAM E. JAMES,
Assistant Attorney General of the State of California,

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IN THE

Supreme Court of the United States

October Term, 1966
No. 98

CHARLES ROBERT ANDERS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

RESPONDENT'S PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of California, respondent in the above entitled matter, hereby respectfully petitions this Honorable Court for a rehearing herein on the following grounds:

(1) The opinion of the Court herein, issued May 8, 1967, contains major factual errors which specifically relate to, and upon which this Court has based its conclusions;

(2) The Court should reconsider and hear further argument relating to the equation of state and federal indigent appellate standards;

(3) This Court should consider further argument relating to the retroactivity of the ruling contained herein insofar as it shall pertain to causes where the appeals have become final prior to the rendering of the instant opinion.

I.

The Court's Ruling Herein Is Based Upon a False Premise Arising Because of Factual Errors.

In its opinion, this Court said, at pages 4 to 5:

". . . Here the court appointed counsel had the transcript but refused to proceed with the appeal because he found no merit in it. He filed a no-merit letter with the District Court of Appeal whereupon the court examined the record itself and affirmed the judgment without comment. On habeas corpus some six years later it found the appeal had no merit. It failed, however, to say whether it was frivolous or not, but, after consideration, simply found the petition to be 'without merit.' The Supreme Court, in dismissing this habeas corpus application, gave no reason at all for its decision and so we do not know the basis for its action. We cannot say that there was a finding of frivolity by either of the California courts or that counsel acted in any greater capacity than merely as *amicus curiae* which was condemned in Ellis, *supra*. Hence California's procedure did not furnish petitioner with counsel acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity. . . ." (Opinion pp. 4-5.)

Exception is first respectfully taken to that part of the above quotation wherein this Court found that after counsel's no-merit letter was written, the District Court of Appeal ". . . examined the record itself and affirmed the judgment *without comment*. . . ." (Emphasis added.) (Opinion p. 5.)

As this Court recognized in page 1 of the instant opinion, the District Court of Appeal unanimously affirmed the conviction in a written opinion set forth in 167 Cal. App. 2d 65, 333 P. 2d 854.

This four-page published opinion in its original unprinted form is part of the record herein and is marked Exhibit 11 attached to the Stipulation as to Contents of Record filed in the office of the Clerk of the Supreme Court on October 10, 1966. Additionally, the opinion is referred to in Appellant's Opening Brief at page 3, and in Respondent's Brief at pages 1, 7, 12, 19, 31, and 32.

As study of the detailed opinion originally written by the District Court of Appeal on January 9, 1959 indicates, that court considered all the possible contentions and found each of them to be totally without merit whatever. Accordingly, it is respectfully submitted that this Court's conclusion the District Court of Appeal initially "examined the record itself and affirmed the judgment without comment" is erroneous.

It is true that "[o]n habeas corpus some six years later they found the appeal had no merit." Since the District Court of Appeal had already written its detailed opinion in 1959, it certainly should not have been required to write another full opinion when the matter was again reviewed on collateral attack. It is submitted that the finding of utter lack of merit in 1959, along

with the detailed explanation of the reasons therefor, and the subsequent review and repeated finding of no merit of 1965, was tantamount and semantically equivalent to a finding of frivolity.

If the paragraph originally taken from pages 4 and 5 of this Honorable Court's opinion is paraphrased by inserting this correct fact, an entirely different result would occur; *i.e.*:

> Counsel examined the record and transcript and found no grounds for appeal; he wrote a no-merit letter to the District Court of Appeal which court examined the full record and reached the same conclusion as counsel that the appeal lacked merit, and expressed its views and reasons therefor in a detailed written opinion; on collateral attack six years later it still found no grounds for appeal; this was tantamount to a finding of frivolity.

Exception is also taken to the assumption that California appointed counsel to act as an amicus in the instant case. Under the California system, whether before or after *Douglas v. California*, 372 U.S. 353 (1963), counsel is now and always has been appointed to act in the capacity of an advocate for the indigent appellant.[1] In the instant case, Mr. Murphy clearly

---

[1]For example, the following memorandum to appointed attorneys was issued by the Anders District Court of Appeal in October, 1966:

"MEMORANDUM TO APPOINTED ATTORNEYS

"The court does not approve the practice of attorneys in advising the court that an appeal has 'no merit.' An at-

was an advocate. Who else but an advocate would actually take the time and trouble to visit the indigent in prison, as he did, undoubtedly in the hope that the personal conference with the client might give a clue to the existence of some hidden error which could not be gleaned from a thorough search of the full clerk's and reporter's transcript composing the record in this case.

It is respectfully submitted that the District Court of Appeal, on its first detailed examination of the entire record in 1959, provided the full consideration and resolution of the matter that it would have done if counsel (who actually acted entirely as an advocate) had written a brief as suggested in the opinion of this Honorable Court.

Respondent respectfully submits that the Court should reconsider its opinion and ruling herein in light of the facts shown by the record on file herein.

---

torney is appointed to serve as an advocate for the appellant, subject to the same obligation of loyalty as though privately employed.

"The court is aware that there are cases in which no ground of reversal appears, and it does not expect any attorney to assert any false statement of fact or law. (See Bus. & Prof. Code sec. 6068, subd. (d).) If counsel is unable to find any grounds of reversal he may state the facts of the case and leave the decision to the court.

"Before any appointed attorney concludes that he has no points to argue, he should ask his client what grounds of appeal he wishes raised. Any points which the appellant personally desires to have raised should be set forth in the brief as contentions of the appellant even though counsel is unable to supply any legal argument or authority in support of such contentions."

II.

The Court's Opinion Has Declared Unconstitutional a State Process Which Gives Greater Protection to the Indigent Appellant Than the Procedure Followed in the Federal Courts.

Under the District of Columbia system essentially adopted by this Court as the procedure to be followed when appointed counsel determines an appeal is wholly frivolous, the federal court can dismiss the appeal without any requirement that the court has read the *entire* record.

In California, the full clerk's and reporter's transcript is always before the appellate court and is examined by that court before any disposal is made of the case and a detailed opinion is then written by the court.

On the other hand, it may be, that when this Court refers in the opinion herein, at page 6, to "a full examination of all the proceedings," it is now requiring that federal courts study the full clerk's and reporter's transcript of the entire case (as is done in California) before a determination is made. In such event, of course, the procedure under the California system and federal system would be equated and there would be no objection on our part. However, we urgently and respectfully suggest that this Court grant a rehearing in the instant matter so that clarification may be had in this connection. We fail to see why a different procedure should apply to the state courts and the federal courts in this matter.

III.

Rehearing Should Be Granted to Allow Presentation of Argument on Retroactivity in "No-Merit Letter" Cases Where the Appeals Were Final Prior to the Date of Decision in the Instant Matter.

As the Court is well aware, neither in the brief nor during oral argument was any discussion had relating to retroactivity of the rule of the instant case; however, because of the magnitude of the problem, not only in California, but in numerous other states which apparently followed our practice (see Resp. Br. p. 30), it is earnestly suggested that rehearing should be granted so that argument may be presented to this Court in opposition to retroactivity of the doctrine set forth in the opinion. Serious questions now arise as to the applicability of law in cases such as *Griffin v. California,* 380 U.S. 609 (1965), and *Mapp v. Ohio,* 367 U.S. 643 (1961), for example. In other words, are reopenings to be considered "final" in terms of *Tehan v. Shott,* 382 U.S. 406 (1966), and *Linkletter v. Walker,* 381 U.S. 618 (1965).

In *Harders v. California,* 373 F. 2d 839, U.S.C.A (9th Cir. 1967), the Circuit Court, referring to *Griffin,* took the view where a once final appeal was reopened because counsel was relieved after he reported to the court that the appeal was without merit, that the new interpretation of old constitutional law was not arguable in the new appellate proceedings.

Conclusion.

Wherefore, respondent respectfully and sincerely requests that a rehearing be granted by this Honorable Court in the above entitled matter.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General,

WILLIAM E. JAMES,
Assistant Attorney General,

GEORGE J. ROTH,
Deputy Attorney General,
Attorneys for Respondent.

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SUPREME COURT OF THE UNITED STATES

No. 98.—October Term, 1966.

Charles Robert Anders, Petitioner, *v.* State of California. | On Writ of Certiorari to the Supreme Court of California.

[May 8, 1967.]

Mr. Justice Clark delivered the opinion of the Court.

We are here concerned with the extent of the duty of a court appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal.

After he was convicted of the felony of possession of marijuana, petitioner sought to appeal and moved that the California District Court of Appeal appoint counsel for him. Such motion was granted; however, after a study of the record and consultation with petitioner, the appointed counsel concluded that there was no merit to the appeal. He so advised the court by letter and, at the same time, informed the court that petitioner wished to file a brief in his own behalf. At this juncture, petitioner requested the appointment of another attorney. This request was denied and petitioner proceeded to file his own brief *pro se*. The State responded and petitioner filed a reply brief. On January 9, 1959, the District Court of Appeal unanimously affirmed the conviction, *People* v. *Anders*, 167 Cal. App. 2d 65, 333 P. 2d 854.

On January 21, 1965, petitioner filed an application for habeas corpus in the District Court of Appeal in which he sought to have his case reopened. In that

application he raised the issue of deprivation of counsel in his original appeal because of the court's refusal to appoint counsel at the appellate stage of the proceedings.[1] The court denied the application on the same day, in a brief unreported memorandum opinion. The court stated that it "ha[d] again reviewed the record and [had] determined the appeal [to be] without merit." The court also stated that "the procedure described by *In re Nash*, 61 A. C. 538, was followed in this case . . . ."[2] On June 25, 1965, petitioner submitted a petition for habeas corpus to the Supreme Court of California, and the petition was denied without opinion by that court on July 14, 1965. Among other trial errors, petitioner claimed that both the judge and the prosecutor had commented on his failure to testify contrary to the holding of this Court in *Griffin* v. *California*, 380 U. S. 609 (1965). We have concluded that California's action does not comport with fair procedure and lacks that equality that is required by the Fourteenth Amendment.

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[1] Previously, on January 24, 1964, petitioner, while on parole, had been arrested and convicted of the felony of burglary which was affirmed on appeal and is now pending on a petition for writ of certiorari in this Court. *Anders* v. *California*, No. 492, October Term, 1965. A maximum sentence of 15 years was imposed on this conviction to run concurrently with the prior sentence. The State has raised no jurisdictional grounds here.

[2] *In re Nash*, 61 Cal. 2d 491, 393 P. 2d 405 (1964), held that the requirements of *Douglas* v. *California*, 372 U. S. 353 (1963), are met in the event appointed counsel thoroughly studies the record, consults with the defendant and trial counsel and conscientiously concludes, and so advises the appellate court, that there are no meritorious grounds of appeal; and provided that the appellate court is satisfied from its own review of the record, in light of any points personally raised by the defendant, that appointed counsel's conclusion is correct. The appeal then proceeds without the appointment of other counsel and decision is reached without argument.

I.

For a decade or more, a continuing line of cases have reached this Court concerning discrimination against the indigent defendant on his first appeal. Beginning with *Griffin* v. *Illinois*, 351 U. S. 12 (1956) where it was held that equal justice was not afforded an indigent appellant where the nature of the review "depends on the amount of money he has," at 19, and continuing through *Douglas* v. *California*, 372 U. S. 353 (1963), this Court has consistently held invalid those procedures "where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself." At 358. Indeed, in the federal courts, the advice of counsel has long been required whenever a defendant challenges a certification that an appeal is not taken in good faith, *Johnson* v. *United States*, 352 U. S. 565 (1957), and such representation must be in the role of an advocate, *Ellis* v. *United States*, 356 U. S. 674, 675 (1958), rather than as *amicus curiae*. In *Ellis*, *supra*, we concluded:

> "If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied." At 675.

In *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), the Sixth Amendment's requirement that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence" was made obligatory on the States by

the Fourteenth Amendment, the Court holding that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." At 344. We continue to adhere to these principles.

II.

In petitioner's case, his appointed counsel wrote the District Court of Appeal, stating:

> "I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him. . . . [H]e wishes to file a brief in this matter on his own behalf."

The District Court of Appeal, after having examined the record, affirmed the conviction. We believe that counsel's bare conclusion, as evidenced by his letter, was not enough. It smacks of the treatment that Eskridge received, which this Court condemned, that permitted a trial judge to withhold a transcript if he found that a defendant "has been accorded a fair and impartial trial, and in the court's opinion no grave or prejudicial errors occurred therein." *Eskridge* v. *Washington State Board*, 357 U. S. 214, 215 (1958), at 215. Such a procedure, this Court said, "cannot be an adquate substitute for the right to full appellate review available to all defendants" who may not be able to afford such an expense. At 216. And in still another case in which "a state officer outside the judicial system" was given the power to deprive an indigent of his appeal by refusing to order a transcript merely because he thought the "appeal would be unsuccessful," we reverse, finding that such a procedure did not meet constitutional standards. *Lane* v. *Brown*, 372 U. S. 477 (1963). Here the court appointed

counsel had the transcript but refused to proceed with the appeal because he found no merit in it. He filed a no-merit letter with the District Court of Appeal whereupon the court examined the record itself and affirmed the judgment without comment. On habeas corpus some six years later it found the appeal had no merit. It failed, however, to say whether it was frivolous or not, but, after consideration, simply found the petition to be "without merit." The Supreme Court, in dismissing this habeas corpus application, gave no reason at all for its decision and so we do not know the basis for its action. We cannot say that there was a finding of frivolity by either of the California courts or that counsel acted in any greater capacity than merely as *amicus curiae* which was condemned in *Ellis, supra.* Hence California's procedure did not furnish petitioner with counsel acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity. The necessity for counsel so acting is highlighted by the possible disadvantage the petitioner suffered here. In his *pro se* brief, which was filed in 1959, he urged several trial errors but failed to raise the point that both the judge and the prosecutor had commented to the jury regarding petitioner's failure to testify. In 1965, this Court in *Griffin* v. *California, supra,* outlawed the California's comment rule, as embodied in Art. I, § 13, of the California Constitution.

III.

The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae.* The no-merit letter and the procedure it triggers does not reach that dignity. Counsel should, and can with honor and with-

out conflict, be of more assistance to his client and to the court.[3] His role as advocate requires that he support his clients appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel. The no-merit letter, on the other hand, affords neither the

[3] For comparative purposes see *Tate* v. *United States*, 123 U. S. App. D. C. 261, 359 F. 2d 245, and *Johnson* v. *United States*, 120 U. S. App. D. C. 69, 360 F. 2d 844, which outline the practice followed in the District of Columbia. These guidelines are elaborated in more detail in a "Statement to be handed by the Clerk to Appointed Counsel" which has been prepared by the Court of Appeals for the District of Columbia. We indicate no approval of the requirements set out in the statement or in the cases.

client nor the court any aid. The former must shift entirely for himself while the court has only the cold record which it must review without the help of an advocate. Moreover, such handling would tend to protect counsel from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled. This procedure will assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel.

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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SUPREME COURT OF THE UNITED STATES

No. 98.—October Term, 1966.

Charles Robert Anders, Petitioner, v. State of California. } On Writ of Certiorari to the Supreme Court of California.

[May 8, 1967.]

Mr. Justice Stewart, whom Mr. Justice Black and Mr. Justice Harlan join, dissenting.

The system used by California for handling indigent appeals was described by the California Supreme Court in *In re Nash*, 61 Cal. 2d 491, 495; 393 P. 2d 405, 408:

> "We believe that the requirement of the *Douglas* case [372 U. S. 353] is met . . . when, as in this case, counsel is appointed to represent the defendant on appeal, thoroughly studies the record, consults with the defendant and trial counsel, and conscientiously concludes that there are no meritorious grounds of appeal. If thereafter the appellate court is satisfied *from its own review* of the record in the light of any points raised by the defendant personally that counsel's assessment of the record is correct, it need not appoint another counsel to represent the defendant on appeal and may properly decide the appeal without oral argument." (Emphasis added.)

The Court today holds this procedure unconstitutional, and imposes upon appointed counsel who wishes to withdraw from a case he deems "wholly frivolous" the requirement of filing "a brief referring to anything in the record that might arguably support the appeal." But if the record did present any such "arguable" issues, the appeal would not be frivolous and counsel would not have filed a "no merit" letter in the first place.*

*The Court concedes as much when it states such a brief should be filed only when counsel believes the case to be "wholly frivolous"

The quixotic requirement imposed by the Court can be explained, I think, only upon the cynical assumption that an appointed lawyer's professional representation to an appellate court in a "no merit" letter is not to be trusted. That is an assumption to which I cannot subscribe. I cannot believe that lawyers appointed to represent indigents are so likely to be lacking in diligence, competence, or professional honesty. Certainly there was no suggestion in the present case that the petitioner's counsel was either incompetent or unethical.

But even if I could join in this degrading appraisal of the *forma pauperis* bar, it escapes me how the procedure that the Court commands is constitutionally superior to the system now followed in California. The fundamental error in the Court's opinion, it seems to me, is its implicit assertion that there can be but a single inflexible answer to the difficult problem of how to accord equal protection to indigent appellants in each of the 50 States.

Believing that the procedure under which Anders' appeal was considered was free of constitutional error, I would affirm the judgment.

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and then goes on to hold "if [the California appellate court] finds any of the legal points arguable on their merits (*and therefore not frivolous*) it must . . . afford the indigent the assistance of counsel . . . ." *Ante*, p. —. (Emphasis added.)

Even accepting the Court's requirement, one would have to perceive an "arguable" issue in Anders' case in order to remand it for a new appeal. The most that all of the courts and lawyers who have examined his case have turned up is a claim that the prosecutor commented on his silence at trial. But Anders' conviction was affirmed by the California District Court of Appeal six years before *Griffin* v. *California*, 380 U. S. 609, was decided. Our later decision in *Tehan* v. *Shott*, 382 U. S. 406, was based on the premise that prior to *Griffin* the practice of commenting on the defendant's silence was well-established and thus did not raise an "arguable" issue. Cf. *O'Connor* v. *Ohio*, 385 U. S. 92.